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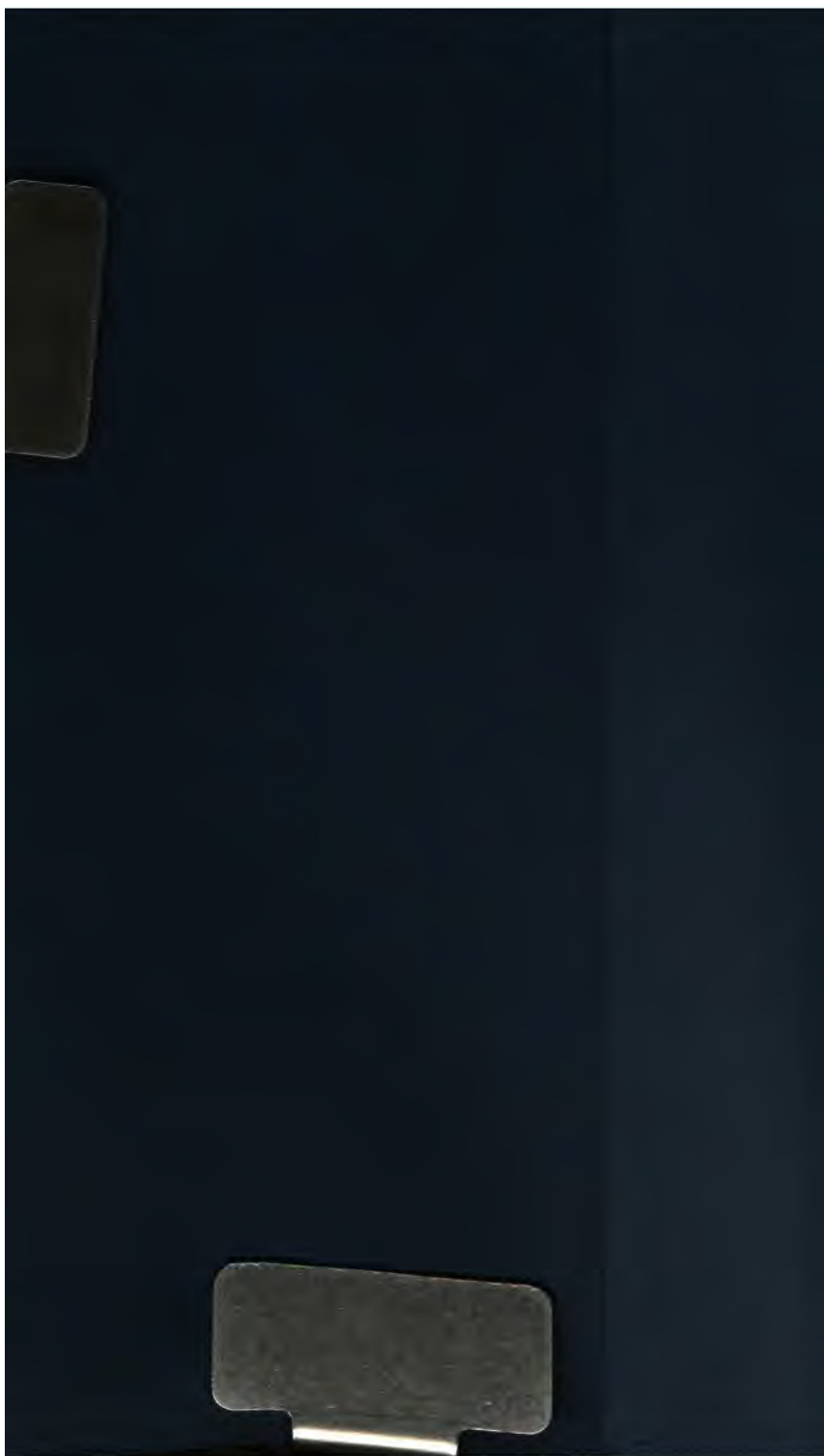
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Henry J Williams Esq
Presented by the author

DISSERTATIONS
ON
THE QUESTIONS
WHICH ARISE FROM
The Contrariety of the Positive Laws
OF
Different States and Nations.

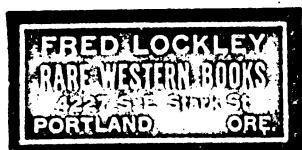
BY SAMUEL LIVERMORE,
Counsellor at Law.

N^o. I.
CONTAINING TWO DISSERTATIONS.

NEW-ORLEANS:
Printed by Benjamin Levy,
Corner of Chartres and Bienville Streets.

1828.





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DISSERTATION I.

*A General View of the Nature of these Questions, and
of the Authors who have treated of them.*

1. THE questions, which I propose to treat in these dissertations, arise from the diversity and contrariety of the positive laws of different states and nations. This variety of laws is a natural consequence of the different modes in which the minds of men are organized, and of the different situations in which they are placed. The law of nature, proceeding from one Supreme Legislator, is uniform and universal in its obligation upon the people of all nations. But the positive regulations, which men have made for their own protection, security and happiness, vary according to the different tempers, habits and occupations of their authors.

2. Even in the countries, united under the power of the Roman emperors, this diversity was found to exist; and to this we have frequent allusions in the works of the Roman jurisconsults. (a)

(a) l. 21. §. fin. ff. ad municip.; l. 5. §. 1. ff. de jure immum.; l. 18. §. 27. ff. de mun. & honor.; l. 1. ff. de albo scrib.;

3. In modern European nations, this diversity of laws has been infinitely greater; particularly in Germany, France and the Netherlands.

4. Of Germany, *Hertius* (b) remarks: *Quotus enim quis est, qui nesciat, unumquemque principatum aut rempublicam, quæ superioritate et potentatu territoriali est prædita; suas easque proprias habere leges, mores, consuetudines, quin in iisdem oppida aut vicos, propriis nonnumquam solere regi legibus.*

5. In France the variety of laws was no less great. In the first place, we find the division into provinces *du droit écrit* and those *du droit coutumier*. The provinces of the second class had not only their several customs, but smaller districts of provinces, and towns, had their peculiar customs and local usages. Thus, in Normandy there was not only the general custom of the province, but there were also the local customs of Rouen, Caen, Gisors, Bayeux, Neuchatel, Vernon, Audely, Verneuil, Evreux, and others. All of these customs amounted to several hundred independent bodies of laws for the government of men, in different parts of the same country. (c)

l. 3. §. 5. ff. quod vi aut clam.; l. 37. ff. de reb. auct. jud. poss.; l. 6. ff. de evic.; l. 34. ff. de reg. jur.; l. 1. ff. de usuris.

(b) *De collisione legum*, sec. 4. n. 2. *Gottlieb Gerhard Titius*, in his treatise *de conflictu legum*, writes to the same effect. *In Germania varietas legum cessare nequit, ex multis illa componatur territoriis quorum singula potestate legislativa gaudent.*

(c) *Les coutumes sont si diverses, que l'on ne pourroit pas trouver au royaume de France deux Chatelleries, qui de tous cas usassent d'une même coutume. Philippe de Beaumanoir, préface aux anciennes coutumes de Beauvoisis.*



6. Of the Netherlands it is said, by *Gerardus Corselius*, (d) that there were as many different sets of laws and customs as there were cities.

7. In these countries it frequently happened, that the inhabitants of one province intermarried with those of another, that the citizens of Rouen, Rennes or Bordeaux, entered into contracts with citizens of Paris, Amsterdam or Brussels, that these contracts were sometimes made in the place of residence of one of the parties, and sometimes of neither, and that the same individual was often the proprietor of lands lying under the jurisdiction of different laws, containing opposite dispositions concerning the acquisition and transmission of such property. There consequently arose frequent collisions between the laws of different countries and provinces, and questions were daily presented to jurisconsults and to courts of justice, in which it became necessary to decide; whether the nature of a contract should be determined, by the law of the place in which it was litigated, by the law of the domicil of one or both of the parties, or by the law of the place where the contract was made; whether the capacity to make a testament should be regulated by the law of the

(d) *In illa tanta consuetudinum institutorumque multitudine et varietate, quibus singulae civitates aut provinciae reguntur. Ac Italica potissimum instituta sunt quibus scriptae sunt doctorum disputationes quas legimus. Belgica ut urbium numero, ita et morum jurisque dissimilitudine ceteras orbis partes superare videri potest. Epistola ad Nicolaum Burgundum.*

testator's domicil, or by that of the situation of his property; whether the form of his testament should be that prescribed by the law of his domicil, of the situation of his property, or of the place in which the testament was made; whether the power of disposing of property, by act *inter vivos* or *mortis causa*, should be regulated by the laws of the owner's domicil, or by those of the situation of his property; whether his estate should be inherited according to the laws of his domicil, or those of the situation; whether the rights of married persons should be determined, by the laws of the place where the marriage was celebrated, by those of the domicil of the husband, or wife, at that time, or by those of a place, to which they might afterwards remove; and an infinite variety of others.

8. These questions have been generally acknowledged to be the most extensive, the most interesting, the most delicate, and the most embarrassing and difficult of any in jurisprudence. But vast as may be the ground they cover, it has not been left unexplored. The Roman laws have indeed decided but few cases; yet the jurisconsults of imperial Rome have established principles, which have served as landmarks to direct the operations of their successors.

9. Previous to the revival of jurisprudence in the twelfth century, the Roman empire had been broken into fragments, and at the time of the establishment of the first schools of law, founded

in consequence of the discovery of the Pandects, the continent of Europe was divided into innumerable large and small states, kingdoms, principalities and republics, either wholly, or partially, independent of each other. The questions, which grow out of the contrariety of laws, were therefore naturally of frequent occurrence, and daily presented themselves to the early doctors and interpreters of the law. Accordingly, we find that they have generally written something upon these questions, and have endeavoured to solve them, and to fix principles in relation to them, by an application of the rules of the Roman law. Although much which they have written is useless, and many of their principles have been exploded; yet some of these have stood the test of legal investigation, and have been fully admitted by the juriconsults of later times. (e)

10. No well digested system seems however to have been written before the time of *Dumoulin*. (f)

(e) Among the ancient doctors, who have treated of these questions, with more or less extent, were *Bartolus*, *Baldus*, *Paulo di Castro*, *James of Arena*, *Ancharanus*, *Aretin*, *Joannes Andreas*, *James of Ravenna*, *Oldradus*, *Gulienus de Cuneo*, *Pierre de Belleperche*, *Salicetus*, *Calderinus*, *Corneus*, *Ludovicus Romanus*, *Antonius à Prato*, *Franciscus Curtius*, *Rochus Curtius*, *Alexander Tartagni*, *Philippus Decius*, *Jean Faber*.

(f) *Charles Dumoulin*, to whom is conceded the title of prince of French juriconsults, was born in the year 1500, and died in 1560. What he has written, upon the subject of these dissertations, will be found in his *Commentary on the first book of the Code*, *verb. Conclusiones de Statutis*, in his fifty third *consilium*, and in his notes on *Alexander*, *Decius* and *Chasseneuz*.

This great man, who joined to the most profound understanding of the Roman laws, a perfect knowledge of all the local customs of France, has given us rules, not only better digested than those of the authors who preceded him, but upon which subsequent writers have not been able to improve. It is to be lamented that so little, in relation to this subject, has been left by him. He has established important leading principles; but has examined few particular questions. (g)

11. *D'Argentré* (h) is the next author, in chronological order, who has undertaken to establish a system in relation to these questions. There has been commonly imputed to this celebrated man too strong an inclination to contradict the opinions of *Dumoulin*, from whom he is said to

(g) Contemporary with *Dumoulin* were *André Tiragueau*, *Aymon Cravette*, and the president *Everard*; all of these were distinguished juriconsults, who have written upon some of these questions.

(h) *Bertrand D'Argentré*, *président du présidial de Rennes*, was born in 1519, and died in 1590. His works, which were published under various titles during his life, were, after his death, collected and published by his son, under the title *Commentarii in Patrias Britonum leges, seu Consuetudines generales antiquissimi ducatus Britannie*. It is observed of him by *Hevin*, that "all his works are the productions of a great genius, who joined to a profound knowledge of the interpreters of the civil law much experience acquired in the exercise of his magistracy." He was indeed a man of great ability and learning, but of a disposition too arrogant and too much disposed to condemn the opinion of others, when opposed to his own.

have differed *plus par émulation et par jalousie, que par raison*. Upon some few questions the opinion of *D'Argenté* has prevailed; but, in the greater number of disputed questions, the sentiments of *Dumoulin* have been generally adopted. (i)

12. *D'Argenté* was followed by *Burgundus*, who has treated of these questions more fully and particularly than any of his predecessors. His work is entitled *Tractatus controversiarum ad consuetudines Flandriæ*. It is worthy of particular attention; and although there be errors in his system, yet he is entitled to the praise of great learning and ability, and of purity and elegance of style. (k)

13. Contemporary with *Burgundus* was *Paulus Christinus* of Mechlin. He was the author of a commentary on the custom of Mechlin and of six volumes of decisions, in which many of these questions are treated.

14. Subsequently we have the decisions of the learned *Stockmans* of Brabant, which are highly

(i) Contemporary with *D'Argenté* was the celebrated *Peter Peck* or *Petrus Peckius Ziricæus*, a counsellor of the supreme Court of Mechlin. In his treatises *De Testamentis Conjugum* and *De Jure Sistendi*, he has noticed some of these questions.

(k) The first edition of the above named work of *Burgundus* was published in 1621, and forms a work of 250 pages 12mo. In the title page he is styled an advocate of the Court of Flanders; but, from the manner in which he is noticed by *Stockmans*, he appears to have been subsequently a judge of the supreme court of Brabant.

worthy of attention. These were composed about the middle of the seventeenth century. (l)

15. *Rodenburgh* has treated this matter more extensively and more methodically than any of his predecessors. His treatise is entitled, *Tractatus de jure quod oritur ex statutorum vel consuetudinum diversitate*; and was published by way of introduction to his treatise, *de jure conjugum*. This author was a judge of the supreme court of Utrecht, and flourished about the middle of the seventeenth century.

16. The work of *Paul Voet*, *de statutis eorumque concursu*, was published in 1671, a few years after the appearance of the treatise of *Rodenburgh*. *Voet* was professor of law in the academy of Utrecht and senator of the court of Vianen. He was unquestionably a man of distinguished erudition, though imbued with the prejudices of the Flemish school in favour of the reality of statutes.

17. *John Voet*, the son of *Paul*, was of the same school. He has given us a short chapter, *de statutis*, in his commentary on the Pandects.

18. *Hertius*, a professor at Jena, published in 1689, a dissertation, *de collisione legum*, which is deserving of attention. (m)

(l) *Peter Stockmans* was professor in the university of Louvain, and afterwards a counsellor or judge of the supreme court of Brabant. His works are comprised in one volume 4to.

(m) *John Nicholas Hertius* was the author of a great number of learned dissertations, which are contained in two thick volumes 4to. His dissertation, *de collisione legum*, occupies about one hundred pages.

19. Many of these questions have also been treated by *Carondas, Bacquet, Chopin, Coquille, Mor-nac, Ricard, Renusson, Le Brun, Mævius, Henrys* and others, and many cases will be found reported in *Louet and Brodeau, Soëfve, Le Journal des Audiences, &c.*

20. In the eighteenth century this subject was destined to be more thoroughly and laboriously investigated, than it had previously been. *Mr. Ripparfont*, a celebrated advocate of the parliament of Paris, having presented his library to the society of advocates, upon condition of their meeting from time to time, to discuss such questions as were differently decided by the different parliaments of France, the questions which arose from the diversity of laws, were frequently discussed. Two of these advocates, Messrs. *Froland* and *Boullenois*, particularly directed their attention to them, and the result was the publication of some works, much more elaborate than any which had before appeared.

21. The first of these publications was by *Froland*, in 1722. This was a memoir on the observation of the *Senatus-consultus Velleïanus* in Normandy, which necessarily involved the examination of many important questions growing out of the conflict of laws.

22. In 1727, *Boullenois* published his *Questions sur les démissions des biens*, and, in his sixth question, gave a dissertation upon statutes, real, personal, and mixed. This occupies about ninety pages.

23. This was followed by *Froland's* large work, published in 1729. This work is in two quarto volumes, and is entitled, *Mémoires concernant la nature et la qualité des statuts*. Mr. *Louis Froland* appears to have read every thing, which had been written, upon the questions which he has undertaken to treat; but he does not seem to have been capable of making a proper use of the knowledge which he had accumulated. The acute perception and discriminating judgment, which belong to the legal mind, were not his. He is therefore constantly embarrassed by the extent of his reading, and is incapable of using it to any beneficial purpose. Hence his reiterated complaints of the embarrassments in which he is involved, by the intricate nature of the questions he has undertaken to examine, and the contradictory opinions of the authors concerning them. In one place, he compares himself to a sick man, who increases his malady by the quantity of remedies to which he has recourse, or to the traveller, embarrassed by a variety of paths which he finds in crossing a forest, and not knowing which to take. (n) In another place he says, *que ces questions sont souvent si difficiles, qu'il ne sait à quel autel adresser ses vœux, pour parler juste sur cette matière.* (o) The president *Bouhier* remarks with great justice of this author, *que ses Mémoires, où il a ramassé, avec un travail prodigieux, tout ce qui se peut dire pour et contre*

(n) *Mem. sur. les stat.* ch. 6, n. 9. p. 145.

(o) Vol. 2. p. 1129.

chaque question, sont un excellent magasin de raisons de douter ; mais qui ne sont pas toujours suivies de celles de décider.

24. In 1732, *Boullenois* published a volume of dissertations on these questions ; to the consideration of which he appears principally to have given his attention, until his death at a very advanced age. (p) The result of his labours was published in 1766, four years after his death, under the title of *Traité de la personnalité et de la réalité des lois, coutumes, ou statuts*, in two volumes quarto. This is much the most complete work which has been written upon the subject. It contains a mine of learning, and displays great vigor and clearness of intellect.

25. In 1742, the learned Mr. *Bouhier*, *président à mortier* of the parliament of Burgundy, published the first volume of his observations upon the custom of that duchy in which he devotes sixteen chapters to the consideration of these questions. This author, and the president *Espiard*, of the neighbouring parliament of Besançon, were regarded as the most learned magistrates of their time in France ; and these observations certainly do fully sustain the fame of *Bouhier*. They should be read by all, who desire to have a perfect understanding of this matter, and they will afford pleasure even to those, who shall think that he carries to too great an extent his predilection for the personality of statutes.

(p) *Louis Boullenois*, advocate in the parliament of Paris, was born in 1680, and died in 1762.

26. From the foregoing cursory view of the works of the principal writers upon these questions, it will be seen, that much greater labour has been bestowed upon them, than was generally known to the gentlemen of the legal profession in the United States, or in England. It is not surprising, that we find no dissertations, or treatises, upon the personality, or reality of statutes, among the books of the common law of England. Since the union of the Saxon heptarchy under Egbert, that country has never been divided into independent provinces, governed by separate laws. One system has governed the whole; aliens have not been allowed to hold real estate; and intermarriages with foreigners were quite unfrequent. Questions arising from the collision of opposite laws were therefore rarely presented to the courts of that nation, and did not furnish subjects for discussion. Towards the close of the last century, some few questions, respecting the operation of the laws of different countries upon some contracts, have arisen. These have been decided without much investigation, and principally upon the authority of some rules laid down by *Ulrucus Huberus*, a jurisconsult of Friesland. The same observation applies to the courts of the United States; in which it seems to have been the common opinion, that no other person than this writer had ever touched this matter. This author, in his *Prælectiones juris civilis*, has devoted nine pages to this subject, and has laid

down some rules, which have certainly not been generally admitted by civilians. He refers to no other authors, except *Rodenburgh* and *John à Sandé*; and indeed I should hardly think that he had read the work of *Rodenburgh*. On the other hand, I have not found the observations of *Huberus*, *de conflictu legum*, referred to by any writer of a later period, with one exception of *Hertius*, who cites his general rules, but not with approbation.

27. Having presented this concise view of what has been written upon these questions, let us now consider something of their nature. They involve an inquiry into the power and effect of human laws. The law of nature has no limits to its jurisdiction, because the power of its author is unlimited. But as the effect cannot be greater than the cause, so is the power of municipal laws necessarily circumscribed within the limits of the power of the legislator. *Finitæ enim potestatis finita est virtus.* (q) *Omnis enim potestas extra fines potestatis attributæ aut propriæ privata est persona, et finitæ potestatis finita jurisdictio et cognitio.* (r)

28. The power of the legislator is to be considered with reference to the object to be affected. If the object to be affected, be the personal condition and capacities of men, the power of the legislator cannot extend so far, as to affect those

(q) l. *duumvirum* 53, *Cod. de decurion.* D'Argentré, in *antiq. cons. Brit.* art. 218, gl. 6. n. 9.

(r) D'Argentré, l. c. n. 11.

persons, who are independent of his jurisdiction. *Statuta non possunt legitimare personam sibi non subditam, nec circa ipsam personam aliquid disponere. (s)*

29. The right of making laws, is that by which the supreme power of a state is distinguished ; and in whatever form this right be exercised, whether in that of an absolute, or limited monarchy, an aristocracy, or a democracy, it is founded only in the consent of the people, either express or tacit. Laws, therefore, which emanate from a legitimate power, must be considered as deriving their authority from the will of the people composing the state or nation, and to be in nature of conventions, which they have formed among themselves, for the settlement of their respective rights and privileges. Now as the effect of conventions is confined to the persons who are parties to them, and does not extend to strangers ; the effect of the positive laws of a state must be equally limited. (t)

30. Or the object to be affected may be immoveable property, and then the power of the legislator is confined within the limits of his territory. *Extra territorium jus dicenti impune non paretur. (u)* Consequently, his power in this respect, is within those limits exclusive ; for no other power can interfere without transcending its jurisdiction. Whether the property affected belong to subjects or strangers will make no

(s) *Bartolus, ad l. cunctos populos, Cod. de Sum. Trin. n. 26.*

(t) *Hertius, de col. leg. sec. 4, n. 4.*

(u) *l. ult. ff. de jurisdict.*

difference. (v) For the sovereign may refuse to permit aliens to hold land in his dominions, as by the common law of England, or he may permit it, as in Louisiana, and may regulate the terms upon which it is holden.

31. Upon these principles is founded the doctrine of personal and real statutes; a matter of vast extent, and presenting questions the most difficult and embarrassing in jurisprudence. Hence the great difference in the opinions of jurists as to the nature of certain statutes, the defectiveness of their definitions, and the difficulty of establishing fixed general principles. But it does not therefore follow, as has been intimated, (x) that the matter is not susceptible of being settled upon certain principles. It has been said, (y) that all the learning and ability, which has been bestowed upon the investigation of these questions have been misapplied; that the great men, who have written concerning them, "have attempted to go too far, and to define and fix that, which cannot in the nature of things be defined and fixed;" and that "they seem to have forgotten, that they wrote on a question which touched the comity of nations, and that that comity is and ever must be uncertain. That it must necessarily depend upon a variety of circumstances, which cannot be

v) *l. rescripto* 6, §. 5, *de mun. & hon.*

(x) In the judgment of the supreme court of Louisiana, in the case of *Saul vs. His Creditors*. 5, *Martin, N. S.* 569.

(y) Same case.

reduced within any certain rule. That no nation will suffer the laws of another to interfere with her own to the injury of her citizens: that whether they do or not, must depend upon the condition of the country in which the foreign law is sought to be enforced; the particular nature of her legislation; her policy; and the character of her institutions."

32. It seems then, that *Dumoulin*, and *D'Argentré*, and *Burgundus*, and *Rodenburgh*, and *Voet*, and *Boullenois*, and *Bouhier*, and *Merlin*, and the whole body of the interpreters of the Roman law, have been grossly mistaken, and have wasted their time in attempting an impossibility. But is it so certain that they have been mistaken? May not, on the contrary, our learned judges have fallen into an error, by confounding their duties with those of a legislator. That the sovereign of a state may pass prohibitive laws, and that his courts will be bound by them, and not by the conflicting laws of other countries, is not denied. This may be illustrated by a supposed case. Before the abolition of the old customs of France the age of full majority in Normandy was twenty years. Suppose the parliament of Great Britain to have passed an act to this effect, "that no action should be maintained upon any contract entered into between persons under the age of twenty one years, *wherever such persons might reside, or whatever might be the law of their domicile.*" Such a statute would be indeed absurd; but the

courts could not disregard it; for it is with the legislator to determine, how far it is consistent with the interest of the nation, to lend the aid of the courts to the enforcement of contracts. So also the legislator may prohibit all actions upon foreign contracts, or between foreigners, from being maintained in his courts. But where there is no such prohibition, it is not in the power of the courts to make one. The judges cannot say, that, in their opinion, it is against the interest of the State to entertain such suits, and therefore they will not entertain them. A citizen of New York, being in New Orleans, borrows money from a person residing in the latter place, who stipulates to receive interest at the rate of *ten per cent. per annum*, which the borrower promises to pay. Such a contract is lawful by the laws of Louisiana; but, according to the laws of New York, it is usurious and void. Could the courts of the state of New York refuse to receive evidence of the laws of Louisiana, under pretence that it would be injurious to one of their citizens? I should say, certainly not. Yet if the principles, avowed by our judges in the case cited, be true, they might do so.

33. It is true, that the study of this branch of jurisprudence presents many perplexing difficulties; but it is not a consequence, that the study is useless. The authors who have treated of these questions do, indeed, maintain opposite opinions, as to the nature of several statutes.

But if this be an objection to the study, it is one which may be equally made to the science of political economy. It may be difficult, but not impossible, to fix certain general principles for the government of these questions. But the same difficulty applies to the whole science of the law.

Omnis definitio in jure civili periculosa est ; parum est enim ut non subverti possit. (z) And the emperor Justinian has told us that there is nothing so certain, however just the thing might be, concerning which doubts, even of an embarrassing nature, might not be raised. *Nihil inter homines sic est indubitatum, ut non possit (licet aliquid sit valdè justissimum) tamen suscipere quantum sollicitam dubitationem.* (a) Yet the body of the Roman law is filled with general principles; and the caution of Javolenus does not go the extent of discouraging all attempts to fix general principles, but to show, that they require mature deliberation and consideration. If the questions, which I propose to examine, present difficulties, they are also interesting. They depend upon no technical rules or positive institutions, but upon the great general principles of law and justice; and may afford still greater pleasure than embarrassment. *De collisu legum anceps, difficilis, et latè diffusa est disputatio, quam nescio an quisquam explicare totam aggressus fuerit. Cujus rei cogitatio, ut cordatum etiam interpretem deterrere potuisset, ita retrò consideranti*

(z) l. 202, ff. de reg. jur.

(a) Novel. 44. cap. 1. §. 3.

mihî, pulchra esse quæ difficilia, non mediocrem stimulum addidit, ut pro virili in eo argumenti genere, aliquid elaborare conaret. (b)

34. If I do not mistake the matter, it is particularly important, in this country, to have established some fixed and correct principles for the determination of the questions, which may be expected to arise from the various opposing laws of the several states. The common law of England is indeed the common law of nearly all the states; but as each has an independent legislature, uniformity of legislation cannot be expected. Further than this, we have one state, of great and increasing importance, in which we find an entire system of laws, of different origin and different nature, from the laws of the other states. Take as instances, the rights of married persons, successions or inheritances, and the power of disposing by will. These are entirely differently regulated, by the laws of Louisiana, and by those of the other states. So also the rules which govern the contract of sale in Louisiana, are, in some respects, essentially different from those established by the laws of other states. It seems therefore to be important, that there should be some settled principles, and that these should be uniformly observed. No such uniformity exists at present; and unless I am greatly deceived we have no cases decided by our various courts, in which we find so much error and confusion, as in

(b) *Hertius, de collisione legum. sec. 1 n. 1.*

those which involve the conflicting laws of different states. It has therefore occurred to me, that my time would not be uselessly employed, in presenting to the profession a view of the principles maintained by the great jurisconsults of Europe, and also stating such considerations, as my own reflections, in the course of a study of these principles, have suggested to me. I may fail in the attempt to establish true and certain principles, for the decision of the various difficult questions growing out of the contrariety of laws; and yet my labour may not have been in vain, as it may tend to excite a spirit of inquiry into a subject but little understood in this country, and may lead to discussions, by others more capable of accomplishing the object desired.

DISSERTATION II.

Of personal and real statutes, laws and customs, and of the general principles, which serve to distinguish them.

1. THE learned president *Bouhier* (a) considers the difficulties attending these questions to be principally derived from three causes. These are, an ancient prejudice in favour of the reality of statutes, too great deference to the judgments of courts, to which the authors have endeavoured to accommodate their principles, and the multiplicity, or rather subtilty, of the rules which they have proposed.

2. The earliest interpreters of the Roman law made the distinction between personal and real statutes, (b) and established the principles, that

(a) Ch. 23. n. 12—16.

(b) The juriconsults of the continent of Europe use the word statute, to signify the particular municipal law of any state, by way of distinction from the Roman imperial law, which is by them generally styled the common law. In England, the word denotes an Act of Parliament, as distinguished from the common law of England. *Voet, De Statutis*, sec. 4., chap. 1. defines a statute to be *jus particulare, ab alio legislatore quam imperatore constitutum*.

the effects of the former were bounded by no territory, while the effects of the latter were circumscribed within the limits of the territory subject to the power of the legislator. This distinction and these principles were universally admitted by the French jurists. Even *D'Argentré*, the most distinguished partisan of the reality of statutes, admits the principle, that personal statutes are confined within no territorial limits. *Hæc planè discrimen ostendunt, quod personalia nullo territorio finiantur; realia territorii omnibus.* (c) Yet with these same persons it was a received axiom, that statutes were in themselves real. *Consuetudines sunt locales.* *Loysel* has stated it as an undoubted maxim of the French customary law, that *toutes les coutumes sont réelles.* (d) And even *Dumoulin*, in one of his notes on *Alexander*, states this as a general maxim and without distinction. *Teneas indistinctè, quod statuta, vel consuetudines, tanquam reales, non extenduntur extra sua territoria.* (e)

3. The president *Bouhier* intimates, (f) that, in this instance, the great *Dumoulin* yielded to the strength of the prejudice in favour of the reality of statutes, and that subsequent reflection alone opened his eyes, to the inconveniences of such a rigorous jurisprudence. This supposition does not accord with history. *Dumoulin* published his

(c) *In Antiq. Cons. Brit. art. 218, gl. 6, no. 16.*

(d) *Institutes Contumidières, liv. 2, tit. 4, art. 4.*

(e) *In Alex. Cons. 16, lib. 1.*

(f) *Ch. 23, n. 39, et 40.*

notes on *Alexander*, in 1543 and 1544; and in 1525, he had written his fifty-third *consilium*. But it is unnecessary to suppose any change of opinion in *Dumoulin*. What is said in the above note must be taken *secundum subjectam materiam*, a real statute, which *Alexander* in this counsel decides, shall not be extended beyond the limits of the territory, notwithstanding the verbal distinction of *Bartolus*, which I shall notice hereafter. Upon this *Dumoulin* says, *Hæc vera opinio est rejecta verbali distinctione Bartol. an loquatur in rem vel in personam, licet eam sequatur Mart. Laud. in tract. de primogenit. chart. 5, Alex. Cons. 44, libro 5, sed teneas indistinctè, &c.*

4. But is there any thing in the note cited, or in the common maxim, that customs are local, inconsistent with the doctrine of the personality of statutes, or with the opinions maintained by *Dumoulin* in other parts of his works? Well considered and understood, I believe there is none. The note and the maxim refer to the direct action of statutes by their own mere power; and no one pretends, that regularly a statute of one country can act directly upon property situated in another. The contrary is admitted by *Bouhier* himself. (g) But *Dumoulin* distinguished between the direct effect of a statute upon property situated elsewhere, and the consequential and indirect effect, which the statute might have upon

(g) Ch. 23, n. 37.

such property, by means of its power lawfully exercised within its own jurisdiction. It is upon this distinction, that he established the personality of the statute of the conjugal community, which does not directly affect property, but disposes *directò super actu et dispositione personarum contrahentium matrimonium*, establishing between them a partnership in moveables and in property to be acquired, and *sic principaliter, primariò et directò disponit in personas subjectas et in actum et informationem actus qui ab eis geritur. Undè non est inconveniens quòd in consequentiam et per indirectum habeat effectum ubique, etiam in bonis et rebus sitis extra locum consuetudinis et domicilii partium.* (h)

5. It has been a consequence of not attending to this distinction, that the advocates for the reality of certain statutes have been led to erroneous conclusions; and a like inattention has led the advocates for the personality of the same statutes to the adoption of many subtile distinctions, calculated rather to embarrass the subject, than to lead to any satisfactory conclusions. In the application of general maxims, however excellent, we must not always carry them to the full extent of the literal meaning of the words, but should understand them with the necessary limitations and restrictions. *Scire leges, non est verba earum tenere, sed vim ac potestatem.* (i) The jurists of the Netherlands, in treating of the effect of the

(h) Cons. 53, n. 8.

(i) l. 17, ff. de legibus.

laws which fix the age of majority, and the partisans of the reality of the laws establishing the conjugal community, seem to have forgotten this rule of law, to have regarded the words rather than the intention of the statutes; to have attended to their remote and indirect rather than their proximate and direct effects; and to have considered the accessory rather than the principal.

6. That a prejudice did exist in favour of the reality of statutes, we have abundant evidence in the works of authors and the judgments of tribunals. Such a prejudice may be ascribed to various causes. The multitude of independent states, which were established upon the ruins of the Roman empire, were barbarous and warlike. Between them there existed an almost constant state of hostility, with hardly any relations of peace and commerce. Mutual jealousy and hatred were the consequence; and these were not only directed against the governments and subjects of the different states, but extended to all their institutions. In such a state of society, it could not be expected, that foreign laws would be favourably received or recognised; but, on the contrary, that they would be jealously excluded. But, in the progress of society, as men become more civilized, these jealous and hostile feelings give place to sentiments more humane and liberal. Nations cease to regard each other as natural enemies, and learn that the prosperity of one may often conduce to the good of another. Mutual rela-

tions of commerce are thus established between them, and it soon becomes apparent, that justice and common utility require, in many cases, from the people and courts of one nation to understand, to acknowledge, and to respect the laws of another.

7. The prejudice, of which *Bouhier* speaks, has consequently nearly disappeared; and where it exists at the present day, it may be considered as the evidence of a contracted mind, or, among judges and practitioners, of a disposition to regard the law, rather as a profession to be followed for the purpose of acquiring property, than as the most excellent and noble of sciences. No man, however, can aspire to the character of an enlightened jurisconsult, who confines his researches to the positive laws of one country. Let us therefore acknowledge the truth of *Boullenois'* observation, "*que le jurisconsulte est l'homme de toutes les nations, et que ses lumières ne doivent pas se borner à décider les questions qui peuvent naître dans une seule nation, mais bien toutes celles qui se présentent chez quelque nation que se puisse être.*" (k)

8. It having been at last conceded, that foreign laws must be in some instances respected, it has been fashionable, in this country and in England, to impute this to the comity of nations; a phrase, which is grating to the ear, when it proceeds from a court of justice. Comity between nations is to be exercised by those who administer

(k) *Traité de la personnalité, &c.* Obs. 3.

the supreme power. The duty of judges is to administer justice according to law, and to decide between parties litigant according to their rights. When an action is brought upon a foreign contract, it is not from comity, that they receive evidence of the laws of the country where such contract was made, but in order to ascertain in what manner and to what extent the parties have obligated themselves. Comity implies a right to reject; and the consequence of such rejection would probably be a judgment ordering a party to do that, which he had never obligated himself to do. This phrase has not always been harmless in its effects, for I have not unfrequently seen it inspire judges with so great confidence in their own authority; that arrogating to themselves sovereign power, they have disregarded the foreign law, which ought to have governed their decision, because of some fancied inconvenience, which might result to the citizens of their state.

9. Even with sovereigns it is not so clear, that the recognition of foreign laws is merely a matter of comity. They have the power to forbid the admission of the foreign law; but justice would then require, that they should forbid the entertaining of any suit upon the foreign contract. The people of an independent nation, may, if they please, surround their territory with an impassable wall, and totally exclude all intercourse with other nations. But if a desire to promote their own interest induces them to cultivate an inter-

course with other people, they must necessarily adopt such principles, as a sense of common utility and of justice will inspire. They cannot pretend to legislate upon the state and condition, the capacity or incapacity, of persons not subject to them. They may refuse to admit such persons to enter their territory; but if they do receive them, they are bound to receive them with that character, which has been imprinted on them, by the laws of the country, to which they are subject. It has not been from comity, but from a sense of mutual utility, that nations have admitted the extension of personal statutes. It has arisen from a sort of necessity, and from a sense of the inconveniences which would result from a contrary doctrine, by which the state and condition of a man, his capacity or incapacity, would change with every change of abode, for however short a time or transitory purpose. It is upon these considerations, that the jurists of the continent of Europe, where these questions have most frequently arisen, have admitted the extension of personal statutes.

10. *Rodenburgh* is one of the authors, who have treated this question in the best manner. After stating, that the power of a statute is necessarily circumscribed within the same limits as the power of the legislator, and can not regularly produce a direct effect beyond those limits; he asks, *Quid igitur rei in causa est, quod personalia statuta territorium egrediantur?* To which he answers: *Unicum*

hoc ipsa rei natura ac necessitas invexit, ut, cùm de statu et conditione hominum quæritur, uni solummodo judici, et quidem domicilii, universum in illa jus sit attributum: cùm enim ab uno certoque loco statum hominis legem accipere necesse esset, quod absurdum, earumque rerum naturaliter inter se pugna foret, ut in quot loca quis iter faciens, aut navigans delatus fuerit, totidem ille statum mutaret aut conditionem; ut uno eodemque tempore hîc sui juris, illic alieni futurus sit; uxor simul in potestate viri, et extra eandem sit; alio loco habeatur quis prodigus, alio frugi; ac preterea quod persona certo loco non affigeretur, cum res soli loco fixæ citra incommodum ejusdem legibus subiaceant, summa providentia constitutum est, ut a loco domicilii, cui quis larem fovendo se subdiderit, statum, ac conditionem incluat: illis legislatoribus pro soli sui genio, optime omnium compertum habentibus, quâ judicii maturitate polleant subditi, ut possent constituere, qui eorum, ac quando ad sua tuenda negotia indigeant autoritate. (1)

Having thus shown the necessity of determining the general state and capacity of persons according to the laws of their domicil; he proceeds to show, in accordance with the opinion of *Dumoulin*, that those laws, which in themselves are merely personal, may indirectly and consequentially have an effect upon property in other jurisdictions. *Hæc igitur personarum qualitas ac conditio, ubi venerit applicanda ad res aut actus alterius territorii, jam indirectè, ac per consequentiam vis illius personalis statuti*

(1) *De jure quod oritur ex statutorum diversitate, tit. 1, c. 3, n. 4.*

extra statuentis, pertinet locum: cum et aliàs non insolitum sit multa indirectè permitti et per consequentiam, quæ directè et expressim non valerent. (m)

11. The president *Bouhier* speaks to the same effect, and considers, that such extension of the effect of personal statutes has been admitted from considerations of general utility, that it is founded upon a tacit *concordat* between nations, to suffer this extension "*de coutume à coutume, toutes les fois que l'équité et l'utilité commune le demanderoient.*" (n)

12. According to this doctrine, there would seem to be something like an obligation upon sovereigns, to admit the extension of personal statutes. Although they are separately sovereign and independent, yet the different nations, forming what we may call the civilized world, may be considered as one great society composed of so many families, between whom it is necessary to maintain peace and friendly intercourse, and whose duty it is, to maintain such principles, as are most conducive to that object and to the general good. It is upon the same foundation, that the law of nations rests.

13. There are certainly cases, where the sovereign of one country may refuse to give effect to the laws of another country, although those laws be clearly personal. By way of example we may say, that a law, declaring persons pro-

(m) l. c. n. 5.

(n) Ch. 23, n. 62.

fessing the protestant religion to be heretics and infamous, would not be respected in a protestant country. (o)

14. The supreme court of Louisiana, for the purpose of "explaining the ideas of the court and to show that it is almost impossible to lay down any general rule on the subject," have stated the following case. "By the laws of this country," say the judges, "slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it is carried to England or Massachusetts, would their courts sustain the argument that his state or condition was fixed by the laws of his domicil of origin? We know they they would not." (p)

15. This question is stated with some ingenuity, but less accuracy. In those states in this union in which a state of slavery is permitted, the state and condition of the slaves are not fixed by any personal statute. They are regarded as property; in most of the states as personal property, and in the state of Louisiana, for certain purposes, as immoveable property. If a citizen of Louisiana were to carry one of his slaves to the state of Massachusetts, the courts of the latter state would certainly hold the opinion, that the slave continued to be the property of his master and subject to be held in slavery; because the constitution and laws of the United States are

(o) *Hertius, De col. legum. sec. 4, n. 8.*

(p) *Case of Saul vs. His Creditors.*

the supreme law of the state of Massachusetts. If however the master should change his domicile and become a citizen of Massachusetts, he could no longer hold the slave as property within the limits of that state. Suppose, however, the slave to be carried to England, the courts of that nation would not regard him as property, but as a free-man; because the common law of England has instructed them, that a state of slavery cannot exist in England. The master would lose his property, but he could not complain. If he had carried prohibited goods, they would have been confiscated, and he would have lost his property. He has carried a slave; the introduction and holding of which as property is prohibited by the laws of England.

16. This case certainly does not show, as the court seems to have supposed, that "even the personal statutes of one country may be controlled by those (personal) of another."

17. Another case, supposed by the same court, is that of a person, who is minor by the laws of his domicile, but major by the laws of Louisiana, in which state he makes a contract. The court asks: "Would it be permitted that he should in our courts, and to the demand of one of our citizens, plead as a protection against his engagements the laws of a foreign country, of which the people of Louisiana had no knowledge; and that we would tell them that ignorance of foreign laws in relation to a contract made here, was to prevent

them enforcing it, though the agreement was binding by those of their own state? Most assuredly, we would not." (g)

18. This is so resolutely spoken, that it must be supposed, the judges have reflected well upon the subject, and that they would make the response, according to such their determination. With all due respect to the court, we may be permitted to inquire, what response the law would make to a citizen of Louisiana, who had entered into a contract with a stranger of such capacity.

19. The laws of Louisiana require, that, for the making of a valid contract, there should be parties capable of obligating themselves; and without going further than the two Codes, which have been promulgated by the authority of the legislatures of the territory and state, we find, that minors are enumerated among those, who have not ability to make a valid contract. (r) If, then, one of the parties to the contract was a minor, it would not be a valid contract, and the court assumes, what is not be admitted, that such a contract, as that supposed, would be a valid agreement, according to the laws of Louisiana.

20. The laws of Louisiana fix the age of majority at twenty-one years, after which a citizen

(g) *Saul vs. His Creditors.*

(r) Code of 1807, page 264, art. 24. New Civil Code, art. 1775.

of that state is reputed major and able to contract. But this is a personal statute, which affects only the citizens of that state. It cannot affect the capacity of persons subjects of other states, without transcending its jurisdiction. This is a principle, maintained by all the authors, whom the courts of the state of Louisiana are bound to respect; particularly by *Bartolus*, whose authority has been so distinctly recognised by the ordinances of the kings of Spain.

21. This principle is laid down distinctly by *D'Argentré*. *Quotiescumque de habilitate, aut inhabilitate personarum queratur, toties domicilii leges et statuta spectanda. Nam de omni personali negotio judicis ejus cognitionem esse cui persona subsit, sic ut quodcumque persona abeat, id jus sit quod ille statuerit.* He quotes *Bartolus*, *Jason* and *Paulo di Castro*, the last of whom, treating of a statute of Modena permitting minors of the age of fourteen years to contract, says that this would not enable a person of that age, of the city of Bologna, to make a valid contract at Modena. *Illud pro regula ponunt, statuta nunquam statuere super habilitate aut inhabilitate non subjecti; et in specie Paulus de Castr. ad l. cunctos pop. putat statutum Mutinense quod legitimat pupillum ad contrahendum in XIV anno, non habilitare Bononiensem Mutinæ contrahentem. Ratio est, quia hîc abstractè de habilitate personæ, et universali ejus statu queratur, idèdque persona à statuto domicilii afficiatur. (s)*

(s) Art. 218, gl. 6, n. 47 & 48.

Therefore he concludes, that a citizen of Paris could not make a valid contract in relation to his estate in Bretagne, unless he were of the full age of twenty-five years, although the age of full majority in Bretagne was twenty years. *Ex quo evenit, ut si civis Parisiensis de bonis quæ in Britannia habet contrahat, necesse habeat annum XXV. ætatis expectare, quia tale est Parisiorum statutum à quo personæ habilitas spectanda est, etiamsi Britannia incolas suos faciat majores ab anno vigessissimo. (t)*

22. Quotations in support of this principle could be multiplied to any extent. Even the writers, who will not admit, that personal statutes can produce any real effects beyond their territorial limits, as *Burgundus*, (u) *Paul* (v) and *John Voet*, (x) *Stockmans*, (y) &c., maintain, that, for all personal effects, the capacity of a person depends absolutely upon the law of his domicil, and nothing can be more personal than the power to contract. The character thus imprinted is not of so transient a nature, as to be borne only so long as the person has his foot on his native soil. *Nam cum personæ nullis agrorum finibus, aut urbium mœnibus sic claudantur, ut excedere non liceat, indita*

(t) l. c. 49.

(u) *Ad. cons. Flandriæ*, tract 1, n. 8.

(v) The following is one of the general rules of *Paul Voet*, *Statutum personale tantum afficit subditos territorii, ubi statutum conditum est, non autem forenses, licet ibidem aliquid gerentes.* Sect. 4, ch. 2, no. 6.

(x) *Ad Pandectas*, lib. 1, tit. 4, pars. 2, n. 7.

(y) *Decisiones Brabantinæ*, dec. 125, n. 8.

libertate infinita sedium mutandarum, in supplicio est aliter effici, aut situm habere, nisi quandiu lubet domicilio locum capere; quod cum quis facit excessu loci, legibus non liberatur, nisi domicilium mutet. Unde evenit ut affectâ quocumque modo personâ domicilii lege aut jure, ea perpetuò sic teneatur, ne ullâ mutatione loci sese possit exuere. (z)

23. Nor can this character be shaken off by any act of the person who bears it. The disability of minors is imposed upon them for their protection, and to guard them against the consequences which might result from their inexperience and imprudence if not restrained. In some parts of the world the age of maturity is earlier than in others. The legislator is supposed to be the best judge of the age, when his subjects can be permitted to act without the aid of tutors or curators; and it belongs to him to fix the period when they can so act. But this power would be merely nugatory, if the subject could dispense with it by his own act, during the time in which he is incapable. It is consequently prohibitive, so long as the prohibition continues.

24. It is we know the common opinion, *communis sententia doctorum*, that even strangers are supposed tacitly to submit to the laws of the place where they enter into a contract; but this refers only to the solemnities of the contract and to those things which belong to the nature of the contract, *tam respectu solemnium, quæ in contractu*

(z) *D'Argentré, l. c. n. 12.*

requiruntur, quam eorum quæ ex natura contractus descendant. It has never been extended further, certainly never to the capacity of the parties. *Alciat*, after stating, that if there was a law at Ferrara requiring persons making a contract to pay something to the prince, this would include strangers making a contract there, and for which he gives this reason: *hîc enim lex rem ipsam, non contrahentium personas respicit.* (a)

25. The opinion of the court above quoted seems to have been founded upon some apprehended inconvenience, rather than upon any principle of law. The argument *ab inconvenienti* may be good as an auxiliary, but never as a principal. But the adoption of their opinion might be attended with greater inconveniences. Suppose, in the case of the law mentioned by *Paulo di Castro*, that a boy from Bologna of the age of fourteen years being at Modena on a visit, should be there seduced into the making of a minor's contract. Could this be considered valid? If so, it would necessarily stop all intercourse between the citizens of the two places. I doubt, whether a court at Bologna would acknowledge the validity of such contract; and I can neither understand, nor much relish, the doctrine, by which the validity of a contract is made to depend upon the circumstance, of the action to enforce it being brought before one tribunal or another.

(a) *Ad. l. cunctos populos, C. de Sum. Trin. n. 16.*

26. The citizen of Louisiana, in the case supposed by the court, may have been mistaken and injured; as he might have been mistaken and injured, if he had contracted with an incapable person of his own state, whose age he had mistaken. But, in either case, the law says, that the mistake must be imputed to himself. *Qui cum alio contrahit, vel est, vel esse debet, non ignarus conditionis ejus.* (b) This is a positive text of law, which no judge in Louisiana can be permitted to disregard, although it may not comport with his notions, of what is convenient or inconvenient, equitable or unjust. It is also a text applicable to the precise case. The word *conditio* is so explained by *Cujas*, in treating of this same law. (c) *Conditio pro statu accipitur, puta pater-familias sit, an filius-familias, servus, an liber. Ætatem, valitudinem, facultates, mores non significat.*

27. The learned *Menochius* has commented very fully on this law. *Qui contrahit cum aliquo præsumitur scire et cognoscere ejus conditionem, et qualitatem, an scilicet si servus, vel liber, minor, vel major, sapiens, vel stultus, et prodigus. Est ratio, quia is qui contrahit diligens et cautus esse debet, in perscrutanda conditione et qualitate ejus, cum quo vult contrahere. Ea propter suæ negligentiae adscribitur, si malè contraxit, ignorans illius conditionem. Hinc dicimus quod is, qui inutuo dedit pecuniam filio-fam. repetere non potest, etsi dicat se ignorasse illum fuisse sub patris potestate, cum*

(b) l. 19. ff. de reg. jur.

(c) Observ. liv. 7, cap. 36.

id scivisse præsumatur. Idem dicimus de eo, qui minori mutuavit, ut eadem ratione repetere non possit. Idem de eo, qui contrahit cum socio mercatoris, quorum societas jam erat finita, n. 1—4. In num. 12 & 13, he states the precise case which we have had under consideration. Extenditur secundò, ut procedat etiam in forensi, qui præsumitur scire statutum, conditionem, et qualitatem ejus, cum quo contrahit. Ita sensit Decius, in Cons. 19, cum dixit mulierem non posse excusare quod ignoraverit statutum domicili mariti de lucranda dote, eo sub prætextu, quod esset forensis, quia etiam ipsa perquirere atque perscrutari debuit statutum et conditionem mariti. (d)

28. The reason of the law is, that contracts are voluntary; and therefore the juriscult *Ulpianus*, in the law *Qui cum alio*, distinguishes between a party contracting, or stipulating, and a payment of a legacy made by an heir, adding: *heredi autem hoc imputari non potest, cum non sponte cum legatariis contrahit.*

29. Therefore, although the payment of a legacy, bequeathed to a person subject to the paternal power, (*filius-familias*) ought to be made to the father; yet where a legacy has been left to a person generally, and the heir, being ignorant of such legatee being *filius-familias*, pays to him, this ignorance will not be imputed to him, and he will be discharged, *cum non sponte legatariis contrahit, id est*, says *Cujas*, *quia non ipse legatarios facit, sed in eos incidit per aditionem hereditatis.*

30. But with persons making contracts the case is different, and with them it is not always true, that they are not presumed to know the laws of other countries. No citizen is compelled to contract with a stranger. If he do make such contract, he is bound to inquire into the capacity of the party with whom he contracts, and the law presumes him to have made such inquiry, and to have understood the laws of the party's domicil, by which that capacity is determined. The ignorance complained of is not "in relation to the contract," but to the capacity of the parties.

31. *Rodenburgh* treats this precise question. After stating, that those laws, which fix the general state and condition of persons, are personal, says, that a person, affected with a state of ability or inability by the laws of his domicil, carries that state with him wherever he may go ; and this he illustrates by examples. At Utrecht persons of the age of twenty years are major ; in Holland not until twenty-five. In both provinces, married women are incapable of doing any act, without the consent and authority of their husbands ; but, in provinces governed by the Roman law, the wife is not subject to the power of the husband. He supposes then a person, under the age of twenty-five years, a citizen of Utrecht, to contract in Holland, a citizen of Amsterdam, of the age of twenty years, to contract in Utrecht, or a married woman, of the province of Utrecht, to make a contract in a place governed by the Roman law, in either case

he says, it is for the contracting parties to inform themselves, concerning the laws of the others' domicil, and what is the character and condition imprinted upon them by these laws; and he concludes, that an inhabitant of Holland, minor by the laws of that province, but major by the laws of Utrecht, cannot make a valid contract at Utrecht; that an inhabitant of Utrecht, of the age of twenty years, may effectually oblige himself by contracting in Holland; that a married woman, under the power of her husband by the laws of her domicil, would in no other place be freed from her incapacity; and that the contract of a married woman, whose domicil was in a province *juris scripti*, made in Utrecht, would be valid.

De quibus et consimilibus id juris est, ut quocunque se transtulerit persona statuto loci domicilii ita affecta, habilitatem aut inhabilitatem ademptam domi, circumferat ubique, ut in universa territoria suum statutum exerceat effectum. Apertiùs rem intuebimur in exemplis. Ultrajecti sui juris efficiuntur qui vigessimum ætatis annum impleverint, apud Hollandos contra ante vigesimum quintum rebus suis nemo intervenit. Apud utrumque populorum nupta citra viri consensum à rebus gerendis arcetur. In regionibus, quæ jure Romanorum hæc utuntur, commerciis guadet uxor liberrimè, potestati virili non supposita. Fac autem Ultrajectinum, qui vigesimum quintum ætatis annum necdum habuerit, contrahere in Hollandia; aut è contra Hollandiæ incolam vigesimum jam annum egressum, Ultrajecti: aut nuptam nostratem contrahere in regione

juris scripti, aut à contra. Quocumque modo se casus habuerit, contrahentium erit respicere ad suum cujusque domicilii locum, impressamque ibidem personæ qualitatem, aut ademptam domi conditionem, cujus ignarus non sit oportet, qui cum alio volet contrahere. Quare Hollandiæ incola major Ultrajecti, minor apud suos, contrahit apud nostrates invalidè. Contrà, Ultrajectinus, lege domicilii major, contrahit in Hollandia efficaciter, ut maximè ex more regionis istius rerum suarum necdum haberetur compos. Uxores domi sub maritorum potestate ita constitutæ, et sine iis nec alienent nec contrahant, nullibi locorum hanc incapacitatem exuunt. Cùm mulieris contrà juri scripto obnoxia contractus, apud nos celebratus, consistat omnimodo. (e)

32. These are the true principles of law, and a judge will greatly mistake his duty, if he disregards them, from any notion, that the people of the state are placed in a state of tutelage under him, and that he is to find remedies, for their want of circumspection in making contracts. He is bound, on the contrary, to say to them, in the language of the jurisconsult *Scævola*, *vigilantibus, non dormientibus, jus civile scriptum est.*

33. I have said, that the tacit submission to the laws of the place of contract had never been extended, so as to affect the capacity of the parties. At the moment, the peculiar notions of *Ulric Huber* did not occur to me; and I believe there is no other author, who has supposed, that there

(f) *De jure quod oritur ex statutorum diversitate, tit. 2, c. 1.*

can be a tacit submission, to produce an effect, which cannot be produced by an express engagement. The author just named, lays down three general rules, which he supposes to be incontrovertible. I. *Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra.* II. *Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur.* III. *Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.* (f)

34. These rules, if true, go the whole extent of destroying the doctrine of personal and real statutes; and *Hertius*, after quoting them, asks: *si solâ populorum conniventia id niti dicamus, quæ juris erit efficacia?* (g)

35. If the second rule be well founded, the consequence will be, that the capacity of a person will not be fixed by the laws of his domicil; but will depend upon the positive laws of the different places, in which he may casually be. According to this system, a Frenchman, before the abolition of the customs, might, in travelling through the kingdom, be one day major, the next day minor, and the day after major again. In the Netherlands, the same changes might have repeatedly

(f) *Prælectiones jur. civ. lib. 1, tit. 3.*

(g) *De collisione legum, sect. 4, n. 3.*

taken place in the same day. So, in the case of a married woman travelling with her husband, she might one day be able to oblige herself and dispose of her property, without the assent of her husband, and the next day be incapable of doing any valid act, without his authority. It is not difficult to perceive, on which side the inconveniences lie; and if any be found to arise from the recognition of foreign laws, it will be recompensed by the benefits to be derived from the reciprocity of the admission.

36. As the mere opinion of *Huberus* is not of itself sufficient to support a rule, which is against the whole current of authority, let us see, if it be founded upon any text of law. He cites the law *relegatorum* 7, *sec. interdicare* 10, *ff. de interdictis et relegatis*.

37. This law is taken from *Ulpian's* book upon the office of proconsul. The jurisconsult says, that the president of a province can banish offenders from the province which he governs, but cannot interdict them from another province, and so the emperors *Marcus Aurelius* and *Verus* had determined. The consequence was, that a criminal banished from the province, in which he had his domicil, might reside in that of his origin. But the emperors *Severus* and *Caracalla* had provided against this, and by a rescript addressed to the president of the province of Spain had authorised the president, who governed the province, in which the offender had his domicil, to banish him not

only from that, but also from the province of his origin. The juriconsult says, that it was just, that the authority of this rescript should extend to those offenders, who might be in the province, although it was not the place of their domicil.

38. What then does this law prove? Certainly, nothing more than what is denied by no one, that even strangers are subject to the penal laws of the place, in which they may temporarily abide, and in which they commit a crime. *Ex-terus delinquens ligatur pœna statuti, idque duplici ratione. Prima: quia ratione delicti sortitur forum, et efficitur subditus jurisdictioni loci. Secunda: quia dando operam rei illicitæ, censetur se obligare ad id quod inde consequitur et illi imputatur, et censetur sese subijcere pœnæ propter hoc statuti.* (h) But it does not follow, that they cease to be subject to the laws, which govern their domicil, or that they change their personal character.

39. This author, in number 12 of the same title, acknowledges, that the personal qualities impressed by the laws of any certain place, go with the person affected into all other places; and that a person having the benefit of age in Friezland, contracting in Holland, cannot there have the benefit of restitution; and that a person, who in the former place is interdicted as a prodigal, cannot enter into a valid obligation in the latter.

(h) *Dumoulin, ad lib. 1, Cod., tit. 1, verb. delictis, page 557, ed. 1681.*

But in the following number 13, he denies this doctrine, and states this case. In Friezland, a son in the power of his father cannot make a testament. He goes into Holland and there makes a testament. It is asked whether this be valid? *Huberus* thinks, it would be valid in Holland, by his first and second rules, but that it would not be valid in Friezland, according to his third rule. Now I cannot conceive, that, by any principle of law, it can be justified, that the courts of one state can correctly decide in favour of a will, upon the ground of the testator's personal capacity to make one; and that the courts of another state may also decide, in relation to the same will, that the testator was totally incapable of making one.

40. Penal laws, and police regulations, are necessarily local. They do not extend beyond the territory of the legislator, and, within that territory, are obligatory upon strangers, as well as upon citizens. The effect of these will be more fully considered in a subsequent dissertation.

41. The forms of acts, the solemnities required for the making of contracts and of testaments, are also local, and will be treated of in their proper place.

42. So also of those matters which concern the nature of contracts. To interpret them, and to ascertain how far the parties, having capacity to contract, have obligated themselves, it is necessary to have recourse to the laws of some place. When both parties to a contract are stran-

gers in the place where it is made, and both have the same domicile, it is a disputed question, whether the law of their domicile, or the law of the place of contract, should be resorted to, for the interpretation of their contract. When both are strangers in the place of contract, and also have separate domicils, another question will be presented. But when one of the parties is a citizen of the place where the contract is made, and the contract is entirely personal, there is no doubt, that the interpretation must be according to the law of the place of contract. The reason is, that, in the opposition of two different systems of law, it is consonant to reason, that the law of the place of contract, being also the domicile of one of the parties, should prevail. In such a case, the stranger is supposed to have tacitly submitted to that law, to have informed himself of it, and to have made its provisions a part of his agreement. If he had made the contract at home with the same party, he might, by an express covenant, have agreed, that the interpretation should be according to the laws of the latter's domicile.

43. But if a person under the power of another at home, *e. g.* a minor under the power of his tutor, or a married woman under the power of her husband, had there entered into a contract with a stranger, and had expressly renounced the laws, which rendered him, or her, incapable, such renunciation would be of no avail. Now although it be a common maxim, that what may be

done expressly may be tacitly inferred, *taciti et expressi eadem vis* ; yet a tacit agreement can never be inferred against an express prohibition.

These considerations suggest many important questions, which belong to a dissertation upon the laws governing contracts.

44. The age of majority here is twenty-one years, in Spain twenty-five years. A citizen of Louisiana may own land in Cuba, or a Spaniard may own land in Louisiana. By the laws of both countries, minors are disabled from contracting, without the authority of a tutor or curator; but the citizens of Louisiana, who have attained the age of twenty-one years, and subjects of Spain, who have attained the age of twenty-five years, are *sui juris* and capable of contracting and alienating their property. The citizen of Louisiana, who owns land in Cuba, may, at the age of twenty-one years, make a valid contract in relation to that land, and this will not be inconsistent with the laws of Spain; because the disability, created by the laws of that kingdom, is imposed upon minors, or upon persons not *sui juris*, but subject to the power of another. Although, by the laws of Spain, the subjects of that kingdom, under the age of twenty-five years, cannot alienate; yet it is for this reason only, that they are *sub potestate alieni*. But a citizen of Louisiana, of the age of twenty-one years, is *sui juris*, and may alienate land in Cuba; because *cessante causa, cessat effectus*. It does not therefore follow, that the statute of

Louisiana produces any direct effect upon property not within its jurisdiction. On the contrary, the permission to alienate is conceded, by the law of the country where the property is situated, as, by that law, the liberty is given to those, who are not subject to the power of another, and are able to oblige themselves.

45. In conformity with these principles it was adjudged by the parliament of Paris in the year 1600, that a person of the age of twenty years, whose domicil was in the city of Senlis, where the age of majority was twenty-five years, could not alienate his estate situate in the county of Anjou, by the customs of which persons, who had attained twenty years, were of full age and able to contract and alienate. In this case the court recognised the doctrine of *Bartolus, Paulo di Castro* and the other interpreters, that *statuta municipalia nunquam disponunt super capacitate aut habilitate eorum, qui non sunt in potestate statuti.* (i)

46. No contrary decision seems at any time to have been made in France; and the principle of this case has received the universal assent of the jurisconsults of that nation. But, in Flanders, and Brabant, an opposite doctrine did at one time prevail, and received the sanction of the most respectable authors. These denied, that personal statutes could produce any other than personal effects beyond their territory, even indirectly and consequentially.

(i) *Louet, Arrêts Notables, let. C. n. 42.*

47. *Burgundus*, the leading advocate of this system, held, that the statute of majority was a personal statute, and that a person, who was not capable of contracting by the laws of his domicil, was equally incapable of contracting in all other parts of the world; but he maintained, that for all real acts it was sufficient, that the person had the age required by the laws of the place where the property was situated. Thus he distinguished between a sale and an alienation, holding that the capacity to sell would depend upon the laws of the domicil, and the capacity to alienate upon the laws of the place of situation.

48. To make his idea more plain he states this case. By the custom of Ghent, persons were minors until they had attained the age of twenty-five years; but by the statutes of Haynault persons of the age of twenty years might alienate their fiefs situated in that county. A citizen of Ghent, of the age of twenty years, sells his estate lying in Haynault, without the authority of his tutor and *sine decreto*. This, says *Burgundus*, produces no effect; the seller contracts no valid obligation and cannot be compelled to deliver possession; but if he deliver possession, the purchaser is then safe, because this is the lawful age required in Haynault for the alienation of feudal property, and that the custom of Ghent cannot take away the liberty of transferring property not subject to its jurisdiction, although it may render its subjects incapable of contracting an obliga-

tion to make a transfer, and thus prevent the necessity of delivering possession. *Statutum reale est, si quis ante vigesimum quintum annum veletur mancipare: si idem veletur contrahere statutum est personale. Quemadmodum enim obligatio actus est personalis, ita et mancipatio actus est realis. Siquidem substantia obligationum non in eo consistit, ut aliquod corpus vel servitutem nostram faciat, sed ut aliquem nobis obstringat ad aliquid dandum, faciendum, vel præstandum. Nec è contra ideo inventa est mancipatio, ut personas nobis obliget, at ut rerum dominia nostra faciat. Quidquid enim mancipatum non est, alienatum non dicitur, cùm adhuc maneat in dominio venditoris, rectè tamen venditum dicitur. Proindè consuetudo quæ obligationem contrahi vetat, id tantummodo dictare videtur, ne obligatio ab ejusmodi personis inita partes obliget. Neque enim existimandum est impedire actum mancipationis: sed à rerum effectu motuque et alteratione abstracta, omnem vim consumit in irritando vinculo personalis obligationis. Unde si invalidæ obligationi legitima supervenerit mancipatio: utique de viribus ejus dubitare nefas puto: quia à personis, hoc est, à promissione subtractum negotium rebus ipsis accommodatur. Sed plenius hoc atque apertius intueri ex ipsis exemplis licebit. Ut puta civis Gandensis ætate minor, tamen vigesimum egressus annum, Hannonica feuda sine auctoritate tutoris vendidit; proculdubio in ejusmodi actu nihil agi existimandum est, et inutilem omninò contrahi obligationem; quia Gandavi, qai aliter emancipati non sunt, ante vigesimum quintum annum rebus suis intervenire prohibentur.*

Si tamen ejusmodi feudi mancipationem fecerit venditor, tutum esse emptorem, et quod actum erit valere cottidianâ accipimus experienciâ, quando hæc sit ætas et competens, quæ in Hannonicorum feudorum alienatione requiritur. Nec enim consuetudo Gandensis potest tollere libertatem mancipationis, quia res alienas legibus suis alligare non potest, hoc enim jus dicere extra territorium. Vinculum tamen obligationis interrumpere potest, hoc est, necessitatem traditionis, vel præstationis ejus quod interest. Quia negotium ibi totum cum personâ peragitur, quam jure potestatis consuetudo sequitur, atque coërcet, quocumque loco constitutam. Nam ut Imola & Castrensis scripsere, qui inhabilis est in uno loco, etiam in alio censetur inhabilis. Quod utique accipiendum est de habilitate, vel inhabilitate, quæ à statuto personali procedit, et ad actus personales dirigitur. (k)

49. This doctrine is maintained by *Christinaeus*, (l) almost in the same words with *Burgundus*.

50. And by *Stockmans*, (m) who reports a decision of the supreme court of Brabant, made in 1654. *Titius*, of the age of twenty years and married, sold an estate lying under the jurisdiction of the custom of Louvain. By the custom of his domicil, the effect of marriage was to emancipate him only for the purpose of administering his estate, but did not render him

(k) *Ad cons. Flan. tract. 1, n. 6 & 7.*

(l) *Decis. Cur. Bel. Vol. 2, dec. 56.*

(m) *Déc. 125.*

capable of alienating. By the custom of Louvain, marriage had the effect of a full majority. The heir of *Tilius* brought an action to annul this sale and to recover back the land, alleging that the seller was incapable by the laws of his domicil, and that this incapacity extended to all his property. The purchaser contended, that, as the question related to the alienation of an immoveable property, it must be decided by the laws of the place of situation. Of this opinion was the court. *Stockmans* approves this decision, saying, that *ubique agitur de rerum soli alienatione, mancipatione, investitura, successione, aliisque translationis et acquisitionis modis, inspiciantur leges loci ubi res sitæ sunt, sive quæstio sit de ætate vel alia qualitate, habilitate vel inhabilitate personæ, sive agatur de statuto verbis in rem sive in personam directè concepto; cùm effectus ipse potiùs quam verba attendendus sit, qui prorsus realis est quoties de rebus soli transferendis et mancipandis quæritur, atque proindè ab hoc effectum statutum omne, quod huc respicit vel eò rem deducit, pro reali habendum judicandumque sit.* This he confirms by the practise in Haynault, where, he says, it was every day determined, that the alienations of property situate in that province, made by persons of the age of twenty-one years, were valid, although, by the laws of their domicil, they were not capable to alienate before the age of twenty-five years; *quia mancipatio prædium ipsum potiùs quàm personam respicit.*

51. *Paul Voet*, in his treatise *de statutis*, after saying, that a personal statute does not regularly extend so as to affect immoveable property elsewhere situated, proceeds to deny, that it can have even an indirect, or consequential effect. *Verùm quod indistinctè procedat mea sententia, ex sequentibus patebit abundè. Quia nullum statutum, sive in rem, sive in personam, si de ratione juris civilis sermo instituitur, sese extendit ultra statuentis territorium. Neque hìc distinguam, cùm lex non distinguit, an sese extendat statutum directè an indirectè, an propalàm an per consequentiam.* (n)

52. *John Voet*, the son of *Paul*, maintains the same opinion. (o) And he is the latest author of this school.

53. The Roman law did not give to the contract of sale the effect of transferring property; but gave to the purchaser a personal action against the seller to compel a delivery of possession. Until tradition, the property remained in the vendor, and it was only when that had taken place that there was said to be an alienation. (p) The contract imposes a personal obligation, and is a personal act. The delivery transfers the property, and is a real act. If, therefore, the contract does not necessarily precede the tradition;

(n) *De statutis*, sec. 4, ch. 2, n. 7.

(o) *Ad pandectas*, lib. 1, tit. 4, par. 2, n. 7.

(p) *l. traditionibus* 20, *Cod. de pactis*, *l. alienatum* 67, *ff. de verb. sig.*

if the latter can produce its full effect, though the former be null, I conceive the system of *Burgundus* to be true. In the particular case supposed by him, his decision is correct; for this relates to the alienation of fiefs in Haynault, and the laws of that province have derogated from the true principles of law, by allowing persons to alienate, who are incapable of contracting. Thus, by chapter 94, *Chartes Gen.* a *filius-familias* is permitted to alienate at the age of twenty-one, although by chapter 110, he cannot contract a personal obligation before the age of twenty-five.

54. Such a disposition of law we can hardly expect to find elsewhere. The rule of the Roman law is quite different. Although tradition was necessary to a transfer of property, yet alone, and without some preceding sufficient cause, it would not produce that effect. *Nunquàm nuda traditio transfert dominium, sed ità si venditio aut aliqua justa causa præcesserit, propter quam traditio sequeretur.* (q) This is a principle of law, which is believed to be almost universal. Therefore, as it is not denied, that the capacity to contract is determined by the laws of the domicil, and that the contract of an incapable person is not valid, such contract will not be a just cause to precede a delivery, and such delivery will produce no effect.

(q) l. 31, ff. de acq. rer. dom.

55, The opinion of *Burgundus* has been ably combated by *Rodenburgh*, in his treatise *De jura quod oritur ex statutorum diversitate*, (r) and by *Abraham à Wesel*, *ad novellas constitutiones Ultrajectinas*. (s) The author last named concludes his argument in this way. *Confessus fuerat Burgundus Ultrajectinum quinto et vicino anno minorem invalidè contracturum, et apud suos, et apud Gelros, cùm statum, quem domi assumpsit, ubique locorum circumferat : status autem ejus est, quod propter præsumptum judicium infirmum rebus suis intervenire nequeat, sub tutore sit, nihil possit sine tutore, ne ætatis fragilitas in perniciem substantiæ suæ convertatur : hæc ratio cum minoris de fundo contractum irritet, utique multò majis irritabit alienationem. Contractu enim rebus nostris non exuimur, sed subsecutâ mancipatione atque alienatione : hinc curator non personæ sed rebus propriè datus dicitur. Neque juris ratio patitur, ut cui contrahendi denegata, eidem mancipandi permissa sit facultas. Etenim coram judice rei sitæ mancipatio hodierna, quicquid contradicat *Burgundus*, implementum simplex est contractus venditionis, sicuti jure scripto habebatur traditio, in id solummodo solenniter actis publicis hodie profitenda, ne clandestinâ traditione fiscus quadragesimo nummo, neve creditores pecuniis suis defraudentur. Cum ergo totus venditionis contractus ob defectum ætatis sit irritus, nec sit quod mancipatione solenni impleri possit, utique nuda simplexque fundi*

(r) Tit. 2, cap. 1.

(s) Art. 13, n. 24 & 25.

mancipatio omnino nihil operabitur, cessante causâ ad mancipandum idoneâ.

56. From the foregoing observations the following rule will appear clearly to result. *When the personal statute, of a person's domicil, is in opposition with the personal statute of the place, where his property is situate, the personal statute of the domicil will prevail.* This rule was laid down by *Boulle-
nois*, (t) was approved by *Bouhier*, (u) and has since been received as an admitted axiom. It necessarily follows, from the principle, that statutes cannot habilitate persons not subject to them, nor in any way dispose concerning their general capacity or incapacity. The domicil and the situation being under different jurisdictions, the law of the latter cannot affect the person, who derives his capacity from the law of the former, and being by that law affected with a certain state and condition, he bears that state and condition in all other places. *Jus habilitationis respicit personam, et habet locum etiam extra territorium, et habet ipsam qualificare, id est, habilitare, ubicumque locorum.* (v)

57. The power and effect of real statutes is widely different. The direct effect of these statutes is upon property, although they have an indirect effect upon persons. Their direct effect

(t) *Des démissions*, quest. 6.

(u) Ch. 23, n. 92.

(v) *Baldus*, ad. l. cunctos populos, Cod. de Sum. Trin.

is confined to property lying within the territory subject to the legislator; and, within that territory, they are exclusive of all other laws. When prohibitory, they also prevent the indirect effects of personal statutes of other states.

58. Accordingly, another rule of *Boullenois*, sanctioned also by *Bouhier*, and disputed by no one, is, that *when the real statute of the situation is in opposition to the personal statute of the domicil, the latter must yield to the former.*

59. This is evident from the principles we have before stated. Every legislator has exclusive jurisdiction over the land embraced within the limits of his territory, and may regulate the alienation and transmission of it according to his will. When the personal statute of one country is allowed to produce an indirect effect upon property situate in another, it is, as we have shown, because of the assent of the people of the latter, and because of the personal statute not being in opposition to any real statute of theirs, but rather in conformity with them, producing its effect rather upon the real statute, than upon the property. Thus, *a person of the age of twenty-one years is major, or a person under the age of twenty-one years is minor*: these are personal statutes, and will control the personal statutes of the place of situation, fixing the age of majority at a different period, and will have an indirect and consequential effect upon property, if, by the laws of the situation, a major may dispose of his property and a minor

cannot. In this case, there is no opposition between the personal statute of the owner's domicile and the real statute of the place where his land lies. But where the statute of the domicile imposes no restriction upon the power of a person, of the age of majority, to alienate all his property, and this property is situated under the jurisdiction of a statute, which forbids the alienation of such property by persons of full age, such prohibition controls the personal statute. Examples may be found in some of the former customs in France, prohibiting the alienation of hereditary property, but allowing that of a persons own acquisition. A citizen of Massachusetts, being capable of making a testament, may devise all his real estate; but if that estate lies in Louisiana, he cannot dispose of more than two thirds, provided he leaves, at his decease, a legitimate child, nor of more than one half, if he leaves two children, nor of more than one third, if he leaves three, or a greater number of children. (w) In this case the owner of the property is capable of making a testament and of disposing of his property; but this capacity is controlled by the laws of the state, where this property is situate, which prohibit the disposition of more than a certain part of it.

60. By the Roman law, as we have shown, the contract of sale had not the effect of trans-

(w) Civil Code, art. 1480,

ferring property, even between the parties to the contract. By the common law of England, it has that effect. A person, subject to the common law of England, may, by the law of his domicil, be capable of contracting and alienating, and may make a contract of sale of property, situate in a place governed by the Roman law; which contract would have transferred the property, if it had been situate in the place of his domicil; but, without an actual tradition will not, in this case, transfer it. Because the real statute of the situation opposes the personal statute of the domicil. So, in different countries, different forms have been provided for the alienation of property. *Ut fraudibus occurratur, multis in locis prudentissimè est constitutum, ut nec obligatio nec alienatio prædii vim habeat, nisi facta coram iudice, sub quo prædium est situm.* (x) These are real and prohibitive.

61. This rule supposes the real statute to be prohibitive. By the common law of England, inheritances never ascend, and collateral heirs must be of the whole blood of the person last seized; but the same law gives an unlimited power of devising by will, all property held in fee-simple. These canons of descent are entirely real; but are not prohibitive of a contrary disposition by man. A citizen of Louisiana, owning land in a state governed by the common law of England, and being capable of making a testament, devises

(x) *Hertius, de col. leg. sec. 4, n. 9.*

that land to his father or mother, or to his brother or sister of the half blood, this devise will be good, although to the prejudice of his heirs at law. For the real statute of the situation, although different from his will, is not opposed to it. In this case, *provisio hominis facit cessare provisionem legis.* (y)

62. These two rules will be found to give great assistance, in deciding many of the questions which grow out of the contrariety of laws.

63. Real statutes affect the immoveable property within the territory, whether possessed by citizens, or by strangers, and thus have an indirect effect upon persons not generally subject to the laws of such territory. *Statutum afficit res ipsas, sive possideantur à cive, sive à forensi.* (z) Therefore, if a citizen of Massachusetts, owning a plantation in Louisiana, dies, leaving no descendants, but a father and mother and brothers and sisters, this property will be divided into two equal portions, one of which will go to the father and mother, the other to the brothers and sisters. (a) If on the other hand, a citizen of Louisiana, owning land in a state governed by the common law of England, dies, leaving a father and mother and brothers and sisters, the whole of this estate will be inherited by his brothers and sisters, to the exclusion of his father and mother.

(y) l. 1 & 2, Cod. de jure emphyteu.

(z) L. rescripto, §. ult. ff. de mun. & hon.

(a) Civil Code, art. 899.

64. But although this be generally true, the rule is not without exceptions; there being cases where statutes, although real will not affect the property of persons having their domicil elsewhere. Such is the case, where the statute is expressly limited to citizens, or is by express words confined to strangers. Thus *Dumoulin*, after stating the general principle, says: *Fallit si statutum expressè se limitet ad fœminas vel personas sui territorii, nec velit excludere externos. Quia tunc exteri utentur jure communi. Item si expressè se limitet ad fœminas externas, quas solas vult excludere; quia tunc illæ solæ excluduntur in bonis in eo territorio sitis. Pariter si vocando primogenitum (ut moris est in Anglia) vel masculos, sese limitet ad indigenas vel subditos: tunc soli hi gauderunt beneficio statuti. Alioquin cum concernat res, prodest omnibus etiam exteris contra cives.* (b)

65. Hitherto we have treated of the effects of personal and of real statutes. We shall now inquire, by what marks they are to be distinguished; and here we have to encounter the greatest difficulties, and shall find the greatest diversities in the opinion of jurists.

66. I shall commence this inquiry, with an examination of the different systems which have been maintained.

67. The celebrated *Bartolus* was the first, of the interpreters of the Roman law, to enter into a

(b) *Ad lib. 1, Cod. tit. 1, page 556, ed. of 1681.*

particular examination of these questions. He distinguished between personal and real statutes, and his opinions, as to the effect of each, were, in many respects, the same with those which have since generally prevailed. But he devised a mode of distinguishing them, which has been for a long time exploded. As this mode was, however, adopted by his followers, was for a long time generally received and followed by able and learned doctors in the law, and has been the principal foundation of some opinions, which have produced important effects, even to the present day, it will be necessary to give it a full examination.

68. This mode will be found in his commentary on the first book of the code, *ad l. cunctos populos*, n. 42, where he says : *Sed posset dubitari de tali questione, consuetudo est in Anglia quod primogenitus succedet in omnibus bonis. Moritur quidam, habens bona in Anglia, et in Italia decessit, quæritur quid juris. Jac. de Rav. et Gul. de Cu. tenent, quod de bonis existentibus in Anglia judicetur secundum consuetudinem illius loci, de aliis quæ sunt in Italia, stetur juri communi ut dividantur inter fratres, per d. l. pupillo ff. de tut. et cur. dat. ab his et quia certa forma est data in bonis ibi positis, ubique non extendatur. Idem tenet Cy. hâc. Alii dicunt quod debet inspicere locus ubi est adita hereditas, et sic ubi quasi contractus est celebratus, sicut in contractibus inspicimus locum contractus, ut l. si fundus ff. de evic. Mihi videtur quod verba statuti, seu consuetudinis, sunt diligenter intuenda. Aut illa disponunt circa res, ut per hæc verba. BONA DECEDENTIS*

VENIANT IN PRIMOGENITUM, et tunc de omnibus bonis judicabo secundum usum et statutum ubi res sunt situatae, quia jus afficit res ipsas, sive possideantur à cive, sive ab advena, ut l. rescripto in fin. ff. de mun. et hon. Aut verba statuti, seu consuetudinis disponunt circa personas, ut per hæc verba, PRIMOGENITUS SUCCEDAT, et tunc, aut ille talis decedens non erat dicta Anglia, sed ibi haberet possessiones, et tunc tale statutum ad eum et ejus filios non porrigitur, quia dispositio circa personas non porrigitur ad forenses, &c.

69. The question here proposed is that of a statute undoubtedly real, a statute regulating successions. A man dies in Italy, owning real property in England, and the question is proposed, whether the eldest son shall succeed to the lands in England, according to the laws of that country, or whether it shall be equally divided among the children, according to the common law. He cites the opinions of *James of Ravenna*, *Gulielmus de Cuneo* and *Cynus*, that property in England shall be inherited by the eldest son, and that property in Italy shall be divided according to the common law. Others, he says, look to the place where the succession is opened. But he is of opinion, that the words of the statute should be attentively considered; and that if it be written in these words, "the estate of the deceased shall be inherited by the eldest son," then the statute is real, and the property will be adjudged according to the law of the country where it is situated; but, that if the statute is written in these words,

"the eldest son shall inherit the whole estate," the statute is personal, and can only affect persons who are subject to it. The consequence will be, that the lands of an Italian lying in England would be equally distributed among his children, if the statute commence with the person.

70. *James of Ravenna, Gulielmus de Cuneo, and Cynus* the preceptor of *Bartolus*, seem to have formed a correct opinion upon the question here stated; but to their works I can have no recourse; and at this day they are not easily to be found. But the questions, of which I am treating, seem to have been very little understood at the commencement of the fourteenth century, when *Bartolus* wrote. This verbal distinction was indeed contradicted and exposed by *Baldus*; (c) but such was the weight attached to the opinions of *Bartolus*, that it was generally received until the sixteenth century.

71. Of this we have some instances in the counsels of *Alexander Tartagni*. (d) The inheritance of a person, whose domicil was at Ferrara, was claimed by a nephew and by a cousin german. The estate was situate in Ferrara, and by a statute of that place the *agnati* exclude the *cognati*. The nephew was the son of a sister of the deceased, the cousin a son of an uncle.

(c) *Ad d. l. cunctos populos.*

(d) *Cons. 44, lib. 5.*

Neither had a domicil in Ferrara. The claim of the nephew was founded on proximity of blood ; that of the cousin upon the statute of Ferrara. As this statute commenced with the person, *Alexander* decided in favour of the nephew, in conformity with the above quoted opinion of *Bartolus*. As the statute begun with the person, he concluded it to be personal, and therefore did not include the parties, who were strangers.

72. Upon this decision *Dumoulin* after observing that *Martinus Laudensis*, *Calderinus*, and *Joannes Andreas* held the same opinion, says, *sed pessimè loquuntur : quia statutum in effectu non disponit de ipsis personis vel earum statu, sed de ipsis rebus, et sic quibuscumque verbis loquatur, ligat omnes quoad res in sua ditione sitas.*

73. *Dumoulin* speaks of this distinction in various other parts of his works, and says it is to be rejected as merely verbal.

74. *D'Argenté* expresses his astonishment, that a distinction so puerile should have been adopted by really wise and learned men like *Bartolus* and his followers. *Quidam putant cum statuti dispositio incipit à personâ personale esse, cum à re reale ; quo nihil potest dici futilius. Nam quid interest an statutum dicat, primogenitus capiat duas partes hereditatis, aut duæ partes hæreditatis veniant ad primogenitum ? Nec quidquam infantius dici poteret de veris prudentibus, nec proinde omnium est ista sententia ; nam quis hic non videt de rebus agi, de familiâ erciscundâ, et dividenda hereditate, cum de jure personæ sæpe nulla*

sit questio ? (e) and afterwards in the same gloss. n. 16, he says: *pudeat pueros talia aut sentire aut docere, nec viros sapientes oportet ludere sophisticâ aut prastigiis verborum.*

75. Since the time of these two great men, this distinction of *Bartolus* does not appear to have had many partisans in France or the Netherlands. It has been expressly noticed and rejected by *Burgundus*, (f) *Stockmans*, (g) *Rodenburg*, (h) *Paul Voet*, (i) *Froland*, (l) *Boullenois* (m) and *Bouhier*. (n)

76. It appears, indeed, from *Boullenois*, that *Billecart* and *Bouvot* had fully adopted the ideas of *Bartolus*, and also that *Samuel Strick*, a German professor who wrote as late as the commencement of the eighteenth century, had done the same.

77. *Gregorio Lopez* (o) and *Matienzo* (p) adopted the same distinction in Spain; the consequences of which we shall see in another dissertation. In conformity with this distinction they decide this law to be a real statute. *Toda cosa que el marido, y la muger, ganaren, o compraren de consuno, ayan lo ambos por medio. (q)* "Every thing which husband

(e) *In antiq. cons. Brit.*, art. 218, glos. 6, n. 14.

(f) *Tract.* 1, n. 4.

(g) *Dec.* 125, n. 8.

(h) *De jure quod oritur &c.*, tit. 1, cap. 1.

(i) *De statutis*, sec. 4, cap. 2, n. 1.

(l) *Mémoires sur les statuts*, part. 1, ch. 3.

(m) *Traité des statuts*, obs. 2.

(n) *Ch.* 23, n. 46 & 47.

(o) *Ad. l.* 24, tit. 11, partida 4, gl. *ganancias*.

(p) *Ad. l.* 2, tit. 9, lib. 5, *Recop. gl.* 1, n. 75.

(q) *l.* 1, tit. 3, lib. 3, *Fuero Real*.

and wife shall gain or purchase together, they shall have equally between them." Upon the ground of this distinction, then, the following statute must be regarded as personal. *Hommes et femmes conjoints ensemble par mariage, sont communs en biens meubles et conquêts immeubles faits durant et constant ledit mariage.* (r) Yet these two laws were intended to produce precisely the same effect. To say, that one of these laws is real and the other personal, is to give effect to a verbal construction of the law against the manifest intent of the legislator. This mode of adhering to the letter, in opposition to the intent and meaning of the law, is not only against natural reason and good sense, but is reprobated by many express texts of law. *Nos enim non verbis, sed ipsis rebus leges imponimus*, says the emperor *Justinian*. (s) *Non figura literarum, sed oratione, quam exprimunt literæ, obligamur*, says the jurisconsult *Paulus*. (t) *Scire leges, non est verba earum tenere, sed vim ac potestatem*, are the words of the jurisconsult *Celsus*. (u) An illustrious example of the rule of interpretation, which forbids the setting up of the literal terms of a law against the intention of the legislator, will be found in the law *scire oportet* 13, §. *aliud etiam* 2, ff. *de excusatio-*

(r) Art. 220, Coutume de la prévôté et vicomté de Paris.

(s) l. omne 2, Cod. commun. de legat.

(t) l. 38, ff. de obl. et act.

(u) l. 17, ff. de legibus.

nibus, in which we have the opinions of *Herennius Modestinus*, *Cerbidius Scaevola*, *Julius Paulus*, and *Domitius Ulpianus* to this effect. (v)

78. *Dumoulin* (w) divides statutes into two classes; 1. those which relate to the forms and solemnities of acts and of judicial proceedings: and, 2. those which concern the merits and decision of causes.

79. This second class of statutes he subdivides into 1. those which depend upon the will of parties, *quæ pendent à voluntate partium, vel per eas immutari possunt*: and 2. those which dispose independently of the will of man. *Aut statutum disponit in his, quæ non pendent à voluntate partium, sed à sola potestate legis.*

80. These statutes of the last description, act either upon persons, or upon things, and therefore he distinguishes them, as personal, or real.

81. When the statute acts upon things, the law of the place, where the thing is situated, is alone to be considered. *Aut statutum agit in rem, et quacumque verborum formula utatur, semper inspicitur locus, ubi res sita est. Undè sive dicat, BONA NON VENIANT AD FEMINAS, sive FEMINÆ NON SUCCE- DANT, semper locum habet in bonis sitis inter fines suos, sive fœminæ sunt subditæ statuto, vel non, sive cives vel extræ.*

(v) See also *Dumoulin*, in *antiq. cons. Paris*, §. 13, glos. 4, n. 8, et *Notæ in Comment. Chasseneux*, page 1104, ed. of 1681.

(w) *Ad lib. 1, Cod. de Sum. Trin. verb. Conclusiones de statutis.*

82. But when the statute acts upon persons, then it affects only subjects, and does not include strangers. *Aut statutum agit in personam, et tunc non includit exteros, sive habilitet, sive inhabilitet personam.* In speaking of the action of statutes upon persons, or upon things, he intends only their direct effect.

83. It thus appears, that *Dumoulin* regarded as personal or real statutes, those only which concern the merits of causes and which are prohibitory. Those statutes, which dispose concerning the nature of contracts, and which are not prohibitory, but are subject to be controlled and changed by the agreements of parties, do not, in his opinion produce an effect by the mere force of the statute or custom, but the effect is produced by the implied assent and tacit agreement of the parties. *Circa idem membrum primæ subdistinctionis notandum: Quod tunc non tam agitur ex consuetudine vel statuto, quàm ex tacito pacto inexistenti, vel ex contractu informato à statuto, vel consuetudine.*

84. *Boullenois*, (x) in treating of the statutes concerning the partnership between married people, has supposed, that *Dumoulin* considered them to be, in their own nature, real, and that he resorted to the system of a tacit convention, in order to avoid the great injustice, which would follow from such conclusion. This, however, was not the opinion of *Dumoulin*, as fully appears from

(x) *Traité des Statuts*, obs. 29.

the foregoing abstract, taken from a part of his works, in which he does not refer to the conjugal community.

85. To understand the system of *Dumoulin*, and the distinction he makes between prohibitive statutes and those which are subject to be controlled by private conventions, it will be necessary to consider the particular case, to which he has applied his doctrine, the interest of the husband in the dotal property of his wife.

86. In the different Italian states, and in those provinces in France which were governed by the Roman law, there existed various regulations with respect to this interest, which was called the *lucrum dotis*. By the statutes or customs of some places, the husband gained by survivorship the whole of the dotal effects; by those of others, he gained a third, by some a fourth, and by others nothing.

87. Statutes of this description do not affect the personal capacity of the parties, but dispose concerning property merely. If then the effect must be considered to be produced by the mere force of the statute, it can be but real, and can only affect property lying within the territory of the statute. Yet, *Baldus* affirms it to be the common opinion of the doctors, that with respect to these gains the customs and statutes of the matrimonial domicil should alone be regarded. *Consuetudines et statuta vigentia in domicilio mariti*. And he adds, *non curo ubi res sint positæ quæ in dotem*

data sunt. (y) This opinion has in Spain received the sanction of positive law. (z)

88. This opinion can have no other foundation than that of an implied contract. A statute cannot of itself produce an effect upon property beyond the limits of its jurisdiction. But the effect of a contract is personal and is extended to the property of the party obligated, wherever that property may be situated. The law imposes upon the husband, who receives a dowry with his wife, an obligation to restore that dowry upon the dissolution of the marriage, and implies an undertaking on his part to perform that obligation. For this the wife is supposed to stipulate, and to this the husband is considered to oblige himself. Or, the law does not require him to restore the whole of the dotal effects, but allows him to retain, as a gain to himself, the whole, or the third, or the fourth part of such effects. In such case, he does not contract an obligation to restore that, which the law allows him to retain; nor does the wife stipulate for such restoration, but tacitly consents to the husband's retaining what the law permits him to retain. This tacit consent is implied from her not requiring an express contract to the contrary. *Velle videtur, qui non impedit, quod impedire potest.* The case supposed, is that

(y) Cons. 208.

(z) l. 24, tit. 11, part. 4, Rodericus Suarez, de bonis acquisitionibus, n. 42 & 43.

of a statute, not absolute and prohibitory, but admitting of contrary pacts in the contract of marriage. The tacit consent cannot be implied, where the power of expressly dissenting is denied.

89. The statute of the matrimonial domicile, which allows to the husband a gain by survivorship in the dotal effects, but does not prohibit an express pact to the contrary, is considered to make part of the contract and to produce all the effects of an express agreement. It therefore is indifferent, whether the dowry consist in moveables, or immoveables, or whether the immoveables be situate within or without the jurisdiction of the statute; for the gain is not statutory, but conventional. There is, however, an exception to this, when the immoveable property, making part of the dotal effects, is situated in a place, where there is a contrary statute with prohibition against any agreement to the contrary. Such a statute would render ineffectual any express stipulation to the contrary, and must equally exclude the effect of any implied or tacit contract. When, on the other hand, the statute of the matrimonial domicile is prohibitive, there is no tacit contract, because there is no volition, and consequently nothing to affect property situated in other places, except the laws of those places. But this will not prevent an express stipulation from having effect upon property situated in other places, where there is no prohibition; because the prohibition, in the case last supposed, is real, and is therefore confined to

the territory of the statute. *Inest tacitum pactum, quod maritus lucrabitur dotem conventam, in casu, et pro proportione statuti illius domicilii, quod prævidetur & intelligitur, et istud tacitum pactum, nisi conventum fuerit, intrat in actionem ex stipulatu rei uxoriæ, et illam informat. Itaque semper remanet forma semel ab initio impressa; ita etiam tenet Bald. Angel. Paul. &c. Non solum inspiciatur statutum vel consuetudo primi illius domicilii pro bonis sub illo sitis; sed locum habebit ubique etiam extra fines et territorium dicti statuti, etiam interim correpti, et hoc indistinctè, sive bona dotalia sint mobilia, sive immobilia, ubicumque sita, sive nomina, ut etiam tenet Baldus. Ratio punctualis specifica procedet in vim taciti pacti ad formam statuti. Veluti: quod tacitum pactum pro expresso habetur. Ergo istud lucrum statutarium propriè non est, nec legale, sed conventitium seu pactionale. Aliàs si statutum esset absolutum et prohibitorium, non obstantibus pactis factis in contrarium, tunc non haberet locum ultra fines sui territorii, nisi expressè de tali lucro conventum fuisset. Quia pactio benè extenditur ubique, sed non statutum merum, hoc est, solâ et merâ vi statuti.*

90. There would seem to be no difficulty in understanding this passage, and yet its meaning has been most strangely mistaken and perverted by *Froland*; (a) and his error has been carelessly adopted by the supreme court of Louisiana. (b) According to them *Dumoulin* is made to say, that the tacit contract has less force than the express,

(a) *Mémoires sur les statuts*, page 63 et 218.

(b) *Case of Saul vs. His Creditors*, 5 Martin, N. S. 569

that the former will not have an extent to affect property situated in another place, where there is a contrary prohibitive statute, but that an express convention of parties, residing in one place, will control the effect of a prohibitory statute of another place, upon immoveable property lying within its jurisdiction. Such an absurdity must not be imputed to this great man. The statute, of which he here speaks, is the statute of the domicil, and not of the situation.

91. Many specious objections have been urged against this doctrine. I shall reserve the consideration of these for a subsequent dissertation upon the conjugal community.

92. *D'Argentré* succeeded *Dumoulin*, and his system is the next to be examined. Previous to his time, the jurisconsults were satisfied with the distribution of statutes into personal and real. He sought to refine upon the subject, and to make a third class of mixed. He says, that, to determine in what territories a statute should have an effect, some had thought it sufficient to consider, whether the statute regarded the person or the thing; but that the great difficulty consisted in knowing, when the disposition of the statute applied to the thing and when to the person, and that those who had written upon the subject had not always properly discriminated, but had sometimes made that fall upon the person which rather concerned the thing. He proceeds to say, that these doctors had omitted to speak of a third

class of statutes, very necessary for a right understanding of the subject, and that this class consisted of those which were mixed, relating both to persons and things. *In ea distinctione tertium quod erat adjiciendum membrum omiserunt, valdè necessarium de his dispositionibus quæ in rem quidem conceptæ reperiuntur, sed tamen rerum in his consideratio præcipua est, qui casus mixtus est de personis et rebus. (c)*

93. The personal statute he defines to be, that which *principaliter de personarum jure, conditione, et qualitate statuitur, abstractè ab omni materia reali. (d)* And afterwards he says, *personam aliter affici statuto negamus, quàm cum de universali personæ statu disponit, et aliam à priori inducit, aut alterat. (e)*

94. He proceeds to give examples of such statutes as he considered to be personal: *veluti ut major ætate et rerum suarum compos dici et haberi debeat, qui vigesimum ætatis annum excesserit, quale est hoc nostrum, art. 457, aut qui, vigesimum quintum, ut Parisiis. Aut cum nuptæ interdicatur omni contrahendi, art. 524. Aut cum hi qui alienæ potestati subsint, negantur posse obligari, art. 214 & 507. Aut cum in liberis statuitur, ut in potestate patrum sint, art. 498. Aut cum prodigo bonorum administratio interdicatur. Art. 491. (f)*

(c) *In antiq. cons. Brit. art. 218, gl. 6, n. 5.*

(d) *Loc. cit. n. 7.*

(e) *Loc. cit. n. 14.*

(f) *L. c. n. 7.*

95. Of real statutes he gives these examples. *Realia sunt, ut quæ de modo dividendarum hereditatum constituuntur, in capita, in stirpes, aut talia. Item de modo rerum et quota donationum. Item illud, ne in testamento legari posset viro ab uxori, quod quidem de immobilibus constituit et rebus soli. Item illud, ne constante matrimonio conjuges res soli donare possunt. (g)*

96. Of statutes, which he regards as mixed, he gives this example. *Mixtorum exempla ponuntur, cum mutatione personæ contingit familiæ exciscundæ judicium mutari, veluti cum res soli immobiles ad æqualem sortem rediguntur, ex eo quia heredes sunt pagani, cum alioqui rerum alia et diversa sit conditio in bonis nobilibus et feudis. Hic enim personarum conditio dividendi judicium mutat. (h)* The other example, which he gives of a mixed statute, is that which prohibits a minor to alienate his immoveable property, and which he distinguishes from a personal statute in this way. *Si ita statuas; minor est, quod intra viginti annos natus est; personale est: si ita, minor ne immobile alienet, quod intra statuti territorium sit; mixtum fit de re et persona.*

97. To the statutes of this third class he gives the same, and no greater effect, than to real statutes. *Quæ realia, aut mixta sunt, haud dubiè locorum et rerum situm sic spectant, ut aliis legibus quàm territorii judicari non possunt. (i)*

(g) L. c. n. 8.

(h) L. c. n. 9.

(i) Ibid.

98. This author does not give a definition of real statutes; but from what he has written, from his examples, and from his mode of classification, it was evidently his opinion, that real statutes were those only which governed things, with entire abstraction of the person; as he also regarded as personal statutes, only those which regulated the condition of persons, with perfect abstraction of all matters real.

99. To consider this matter abstractly, laws may be said to affect merely persons, or merely things, or both persons and things; and that, therefore, they are purely personal, or real, or mixed and partaking, at the same time, of the nature of personality and reality. Accordingly we find that *Rodenburgh*, who admits only the antient division of statutes into real and personal, and wholly rejects this third class of mixed, says: *Aut statutum disponit simpliciter de personis, aut solummodo de rebus, aut conjunctim de utriusque.*

100. But it is one thing, to regard the construction of a statute, another, to regard its substance and effect. *Effectum etenim et in statutis nos intueri oportet, eoque potissimum inspecto, mixtura consideranda, quæ etiam in multis obtinebit statutis.* (a) *D'Argentré* imagined this third class of statutes; because it was rendered necessary, by the strict construction, which he gave to personal and real statutes. But as he allowed to this class no

(a) *Voet, de statutis, sec. 4, cap. 2, n. 2.*

greater effect than to real statutes, the classification is perfectly useless in jurisprudence. To determine the nature of statutes, we must consider them according to their effects; and no statute can be regarded as mixed, unless it produce the effects both of a personal and of a real statute.

101. The first example of a mixed statute, put by *D'Argentré*, is that of a statute undoubtedly real. It acts directly upon property, making an absolute distribution of it among heirs, in consideration, indeed, of the quality of the person, but without affecting that person with any personal capacity, or incapacity. It provides, that, among nobles, the eldest son shall inherit, and that those, who are not noble, shall divide the estate equally. But the quality of noble, or *roturier*, is not *in dispositione*, *sed in enunciatione*. The statute does not qualify the person; but, supposing a certain qualification in the person, directs the distribution of things.

102. The other example stated by *D'Argentré*, *minor immobile ne alienet*, has no greater claim to be considered mixed. This statute supposes the state of minority, and prescribes the effect of that state upon the alienation of immoveable property. The quality of minor is *in enunciatione* only, the disposition of the statute is directed to things. Accordingly, *Burgundus* and the greater number of authors regard this statute as real. *Boullenois* and *Merlin*, however, consider it per-

sonal, upon the ground of its being merely a consequence of the general state of the person.

103. We have seen, that the effects of a real statute are confined to the territory, and within that are absolute upon property, whether possessed by citizens, or strangers. It has been also shown, that personal statutes affect only subjects, and are not limited as to territory. A statute, to be mixed, should have the effects of both; and as neither of those mentioned by *D'Argentré* have such effects, they cannot be considered as mixed.

104. It is in this manner that the system of *D'Argentré*, relating to mixed statutes, has been refuted by *Burgundus*; who concludes, that he cannot admit such statutes to be mixed, as produce only real effects. *Quidquid sit, ego porro ne usum quidem ejusmodi mixtorum esse putem, cum haud aliter quam realia concludantur territorii sui limitibus: nec enim verba, sed effectum in statutis considerari oportet.* (b)

105. This author commences with saying, that statutes are of two kinds, personal and real. *Statutorum duo sunt genera, alia personalia, alia realia. Realia quæ res ipsas dirigunt, à consideratione personæ abstractas: personalia, quæ dumtaxat personas.* He says, that all the old authors were content with this division, but that *D'Argentré*, a man *excellentissimi ingenii*, had added a third number,

(b) *Tract.* 1, n. 1.

namely mixed. He proceeds to examine the statutes supposed by *D'Argentré* to be mixed, and concludes that they are not so, but merely real, and that, unless there be statutes, which have the effects both of personal and of real, it will be sufficient to be contented with the ancient division.

106. According to the system of this author, all statutes, which relate to the alienation of immoveable property, are real. Therefore, he considers the statute, *minor bona sua ne alienet*, to be mixed; the word *bona* including both moveables and immoveables. This statute he says, is personal, in so far as it regards moveables, which depend upon the person, and are governed by the same law which governs the person. The statute will therefore have both real and personal effects. In its operation upon immoveables, it will be confined to the territory; but will have effect upon moveables, wherever they may be placed. *Ergo rectius mixtum dixeris, quod personæ, rebusque in eodem territorio consistentibus jus ponit. Ut puta minor bona ne alienet. Nomen enim personæ generaliter accipitur, ut universa complectatur mobilia, quæ haud alio jure habentur quàm persona ipsa, à quâ legem, situmque accipiunt. Quoties itaque bona alienari prohibentur, non est simplex oratio; nam bonorum appellatione et mobilia continentur, et immobilia. Proinde huic subest, et personale aliquid, et reale, quæ geminant orationem, omnemque prohibitionem faciunt simul circa res, personasque consistere. Statutum personale personas respicit. Reale res certi territorii.*

Mixtum utrasque. Consequenter ea quæ sunt personalia, una cum personâ circumferuntur, quocumque loco se transtulerit, et per universa territoria viresque, et effectum porrigunt. (c)

107. Another statute, which *Burgundus* regards as mixed, is that which prohibits a married woman to contract, or to alienate, without the consent of her husband. This is in accordance with those principles of this author, which have been before fully examined. This statute, he says, is personal, inasmuch as it prohibits the wife from contracting, and real, as it forbids her to alienate her immoveable property. If, by the law of her domicil, the wife be subject to the power of the husband, she cannot make a valid contract in any place whatever; but, according to this system, the alienation of her immoveable property will be effectual, if the law of the situation does not require the authorization of the husband. Concerning this I will refer to what has been before said, concluding only, that the statute in question is purely personal.

108. Concerning the other case put by *Burgundus*, it is observed by *Rodenburgh*, that although moveables are always subject to the law of the owner's domicil, wherever they may be placed, and that real statutes never extend beyond the territory; yet this does not furnish a reason for imagining a third kind of statutes. Because the

(c) *Tract. 1, n. 2.*

reason, why moveables are governed by the same laws which govern the person, is not that the statutes are personal; but that moveables, not having a fixed situation, but being capable of being transported from place to place at the will of the owner, are considered to have their situation in the place of his domicile. Consequently, it cannot be said, that the statute extends beyond the limits of its territory, or that it is personal, although it produces an effect upon moveables elsewhere; because those moveables are considered to be within the territory. He is therefore astonished, that *D'Argentré* should have called statutes affecting moveables personal, forgetting his own preceding definition of personal statutes, that they were those, which dispose of the universal state and condition of the person, abstractly from all things real; which definition does by no means suit a statute regulating moveables. He therefore concludes, that statutes are either real, or personal, and that there are no mixed. *Nec aliud statuti genus comminisci nos illud cogit, quod mobilia extra territorium existentia statuti dispositione contineantur, realia autem statuta non soleant excurrere ulterius, quam sese territorii limites protendant: quæ dubitandi ratio transversum egit Burgundum. Mobilia quippe illa non ideo subjacent statuto, quod personale illud sit, sed quod mobilia certo ac fixo situ carentia, ibi quemque situm velle habere, ac existere intelligimus, ubi larem ac fortunarum fixit summam. Quare quodcunque domicilii judex de mobilibus statuerit, non ideo*

in alibi existentibus obtinere dixeris, quod vires extra territorium porrigat statutum, nedum quod personale sit, sed quod in domicilii loco mobilia intelligantur existere. Unde nec satis demirari queo Argentreum statutum mobilibus indictum vocantem personale, haud bene memorem datae à se paulò ante descriptionis, quâ personalia ea esse docuit statuta, quibus de personarum universali jure, ac conditione, ab omni materiâ reali separatâ disponitur. Quæ utique definitio statuto, de mobilibus concepto, neutiquam congruit. Ut evidenter appareat summam statutorum divisionem in duo genera deduci, ut alia personalia, alia realia, nulla mixta sint. (d)

109. Rodenburgh considers statutes under three points of view, as disposing merely of persons, merely of things, or jointly of persons and of things. Those of the first class he regards as purely personal, those of the second class as purely real, and those of the third class as sometimes personal and sometimes real.

110. To explain this more fully, he says, that either the statute fixes the universal state and condition of the person, with entire abstraction of real matters: *Aut universus personæ status, aut conditio in dispositione statuti vertitur, citra ullam rerum adjectionem*, as in these two examples, *quoto quis ætatis anno sui juris sit; quando exeat parentum potestate. (e)*

(d) *De jure quod oritur ex statutorum diversitate, tit. 1, c. 2.*

(e) *Loc. cit.*

111. Or the statute disposes of things without requiring the aid of any act of man. *Aut in solas nudasque res statuti dispositio dirigitur, ut nullum intervenire necesse sit actum hominis, aut aliquam concurrere personæ operam.* Such are the laws which regulate successions *ab intestato, ut bona materna cedant maternis, paterna paternis; nothi succedant matribus, non succedant patribus; quando succedatur in stirpes, quando in capita.*

112. Or, finally, the statute permits, forbids or regulates what persons may, or may not do, in relation to their property. *Aut permittat denique, vetat, aut ordinat actum à personis circa res peragendum, ex utriusque complexu constructum statutum, contra quod, ut queat committi quippiam, personæ actum intervenire necesse est.* Of this last class he states the following examples. *Sine indulto Principis de rebus suis nemo testato: conjuges sibi invicem non leganto; vir citra consensum uxorium res soli non alienato.*

113. Having made this division, he proceeds to an inquiry into the mode of distinguishing what statutes are personal and what are real. As to the statutes of the first and second classes, he thinks it sufficient to consider the subject of the statute, without attending to its motive; so that, if the law dispose only of the universal state, quality, or condition of persons, abstractly from all consideration of their capacity or incapacity to do particular acts, the statute is undoubtedly personal. *Si persona status, qualitas, aut conditio, cui lex in universum ponitur, sola sit in statuti*

dispositione, citra ullius actûs à persona exercendi mentionem, statutum, haud dubiè personale sit habendum. But statutes which concern inheritances are merely real. *In rerum verò successiones scripta statuta merè realia sint.* (a).

114. Finally, if the question be of a statute made to determine, what acts a man may or may not do, he thinks it important to inquire, if the act permitted, or prohibited, pertain to the general state of the person, so that the permission or prohibition is conformable to that general state, or if the permission, or prohibition is contrary to that general state, if it troubles or deranges that state. *Certo denique actui, persona gerendo, si præfigatur lex, intersit utrùm ad personarum pertineat statum, aut turbet earum conditionem, an non.* In the first case, the law is to be regarded as personal. In the second case, he thinks, that the nature of the act, permitted or prohibited, is alone to be considered ; so that, if the act be real, as an alienation, the statute will be real ; but if the act be personal, as a contract, the statute will be personal. Therefore, that, in this second case it will be unnecessary to consider the person, of whose act the statute disposes, or the motive of the law, which may have been derived from the quality of the person and have caused the making of the statute ; but the statute will take its denomination from the object, or act, which is permitted

(a) *Loc. cit.*

or prohibited. *Hoc vero casu, natura actus ac qualitas veniat in considerationem, ut si realis sit actus, quales sunt rerum alienationes, realium numero, sin personalis, qualis est contrahendi potestas, personalium classe statuta veniant; adeoque tum non spectandam personam, de cujus actu statuto disponitur, aut rationem, quæ à qualitate personali forsan ducta statuto causam dederet, sed denominationem desumendam esse ab objecto vel actu, ad quem applicatur personæ vel inhibita vel permissa agendi facultas. (b)*

115. The system, next to be considered, is that of *Paul Voet*. He says, that the common division of statutes is into real, personal or mixed. He states and rejects the distinction of *Bartolus* before noticed; and then proceeds to an examination of the statutes, which *D'Argentré* and *Burgundus* had considered to be mixed. He denies, that these statutes can be regarded as mixed; because the effects of statutes are principally to be looked to, and that those supposed had no effect beyond the territory of the statute. *Verum in prænominatis, nullâ ratione effectus est mixtura, ut quæ non extra territorium statuentium sese extendunt. (c)* He notices particularly the statute, *ne minor bona alienet*, which *Burgundus* supposed to be personal, inasmuch as it governed moveables, and had effect upon them beyond the territory of the statute, and real, as its effect upon immoveables was

(b) *Loc. cit.*

(c) *De statutis, sec. 4, c. 2, n. 2.*

confined to the territory; and says, that the person of the minor is no more affected *primariò*, by a prohibition to alienate moveables, than by a prohibition to alienate immoveables: *neque enim magis afficitur persona per prohibitam mobilium alienationem, quàm immobilium*: but that moveables are considered to have no other situation, than that of the owner's domicil: *verùm quòd mobilia esse fingantur et intelligantur, intra territorium, ubi minor domicilium habet*. He therefore does not admit, that in the understanding of the law, such statute has any effect beyond the territory, because *mobilia ibi censeantur esse, secundùm juris intellectum, ubi is, cujus ea sunt, sedem atque larem fortunarum suarum collocavit. (d)*

116. To make his ideas more plain, he considers statutes in two points of view; first, in respect of the objects which they affect; and secondly, in respect of the effects which they produce.

117. In respect of their objects, he thinks, that some are personal, and some real; *illa quæ afficiunt personam, adeoque ei quasi inhærent; hæc quæ rem afficiunt: illa quæ circa personam potissimum quid disponunt, seu in ordine ad personam; hæc quæ circa rem, et potissimum, in ordine ad rem, aliquid statuunt. (e)* Considered in this point of view, he thinks there can be no statutes of the mixed

(d) *De statutis, sec. 4, c. 2, n. 2.*

(e) *Loc. cit. n. 3.*

kind; because all statutes must have a predominating effect, either upon persons, or upon things, and should therefore be classed, according to the object which predominates. *Et ita forte nulla dabuntur mixti generis statuta, quod vel magis rem quam personam, vel magis personam quam rem afficiant.* This he confirms by an argument drawn from the institutes, which divide actions into those *in rem* and those *in personam*. (a)

118. Considering statutes in respect of their object, he does not think, that those, which regulate the solemnities and forms of acts can form a separate class; as these must affect either the person or the thing.

119. But statutes, considered in relation to the effects which they produce, are, in his opinion, real, personal, or mixed. *Quod si statuta ratione quorundam effectuum considerentur, sic meo sensu, alia erunt realia, alia personalia, alia mixta.* (b) Real statutes, he says, are those, which have no effect beyond the territory of the legislator; but within that territory affect strangers, by reason of their immoveable property there situate. *Realia, quæ non extra territorium statuentium vires suas exserunt. Sed tamen non subditos ligant, ratione bonorum immobilium ibi sitorum.* That personal statutes are those which extend beyond the territory, and adhere to the person in all places; but

(a) §. 1, *Inst. de action.*

(b) Sec. 4, c. 2, n. 4.

which affect only subjects, and not strangers. *Personalia, quæ etiam sese extendunt extra territorium, adeoque secundum D. D., comitari dicuntur personam, ubique locorum, ut tamen respiciant subditos, non externos, aut peregrinos, qui ab alieno territorio nullam qualitatem accipiunt.*

120. Regarding statutes in respect of their effects, he considers, that those may be called mixed, which produce an effect, both within and without the territory, which, within the territory, bind not only citizens but strangers, and which have an effect beyond the territory upon property, wherever situated; such statutes having the effects both of real and of personal statutes. *Sicque mihi mixta dicuntur, quæ effectu aliquo inspecto, partim intra, partim extra territorium, vires exserunt. Intra, in quantum obstringunt omnes, sive incolas, sive forenses, ibi contententes vel aliquid agentes; extra, in quantum sese extendunt ad omnia bona, ubicumque locorum jacentia. Illud participando, de statutis realibus, hoc de personalibus. (c)*

121. Therefore, he considers, that those statutes, which dispose *de modo vel solemnitate, in omnibus negotiis et causis sive judicialibus sive extrajudicialibus, adhibendâ*, are mixed.

122. This class of mixed statutes, imagined by Voet, demands some few observations. In the first place, it is not universally true, that statutes, prescribing the forms and solemnities of acts,

(c) Sec. 4, c. 2, n. 4.

have an effect upon property situate in all other places, as *Froland* (d) has abundantly shown, from a great number of instances. Secondly, although the effects of statutes are to be principally considered; yet the nature of them is not to be altogether determined by the extent of the effects which they produce; or, to express my meaning more accurately, they do not depend upon the territorial limits of the places, in which their effects are produced. It is of the nature of real statutes, to affect directly things, and of personal statutes, to affect directly persons. The direct effect of statutes, which prescribe the solemnities and forms of acts, is neither upon things, nor upon persons, but upon the act, the authenticity of which they are intended to establish. A statute requires, that a testament shall be made in presence of a certain number of witnesses. This does not affect the capacity of the testator to make a testament, nor has it any concern with the power to dispose of his property; but merely provides for certain solemnities, in order to establish the authenticity of this declaration of his will. As a statute, of this description, acts neither upon the person, nor upon the property, *primariò*, it does not partake of the nature, either of a personal, or of a real statute, and therefore cannot be considered as mixed and compounded of both. It is of a nature entirely distinct; as will be more fully shown in a separate dissertation.

(d) *Mem. sur les stat.* part. 1, ch. 6, n. 8,

123. These observations apply to those formalities, which concern the authenticity of acts, There are others which are attached, either to the person, or to the thing. Such are the statutes, which require the express authorization of the husband to the contract of the wife; and those, which require, that acts of sale, or of hypothecation, shall be recorded. The former are consequent upon the state of the person, and as the accessory follows the nature of the principal, they can only be regarded as personal statutes; the latter are merely real. It is of these, that *Vander Meulen* speaks, in a passage quoted by *Boullenois*. *Hæc solennia vel circa actum personalem, adeoque personam, vel circa actum realem, adeoque rem versantur. Quod si sint prioris generis, solennia ut accessoria naturam principalis sequuntur, personalia dicenda sunt, et vice versa; in tantum ut semper ad personam vel rem referri queant.*

124. *Froland* seems to have had a partiality for the opinions of *D'Argentré*; and adopts his definition of a personal statute. According to this author, the real statute is one *qui regarde les fonds* and the personal statute *est celui qui concerne universellement la personne, abstraction faite de toute matière réelle.* (e) Yet *Froland* maintains the personality of the *Senatus-consultus Velleïanus*, which incapacitates females for one particular contract only, and cannot, therefore, be said to affect the universal

(e) *Mém. sur les stat. p. 51 et 63.*

state of the person. He is also of opinion, that the law *Julia de fundo dotali* rendering inalienable the dotal property is personal; yet this law cannot be said to concern the person of the wife, abstractly from all things real.

125. *Boullenois*, in his first work published in 1727, examined the examples of mixed statutes stated by *D'Argentré* and *Burgundus*, and concluded, that neither of them were mixed; and in his great work, published after thirty years reflection, he makes the same conclusion. In the first work he concluded, that it was unnecessary to suppose such a class, that no statute could be considered mixed, unless it disposed, at the same time, of persons and of things, *d'une disposition principale et non dépendante nécessairement l'une de l'autre*; and that this would not be a single statute, but two statutes contained in the same law, one of which would be personal and the other real. He states this instance; *Un chacun de franche et libérale condition peut s'obliger personnellement par emprunt, cautionnement, &c.; mais ne peut charger, vendre, ni hypothéquer ses propres, si ce n'est par le consentement de son héritier apparent, ou par nécessité jurée*. If this were to be considered as one statute, it would be necessary to admit it to be mixed; inasmuch as it contains one disposition purely personal, and another, which is undoubtedly real. But such dispositions, contained in the same law, amount to two distinct statutes, having each their separate effect. As, in this instance, a man is permitted

to contract a personal obligation. This is a personal statute. He is also prohibited from selling, or hypothecating, his hereditary property, except with certain formalities. This disposition is undoubtedly real. These dispositions will have their distinct effects; and it is immaterial, that they are found in the same law; for, upon a different principle, all statutes might be called mixed.

126. His subsequent reflections, however, led him to the belief, that there were statutes, which affected, at the same time, persons and property, and which might consequently be called mixed. To these statutes he gives the denomination of *personnelles réelles*. His reason is that these statutes affect equally, *primariò et principaliter*, persons and things.

127. This author adopts, with some few variations, the system of *Rodenburgh*. He distinguishes two sorts of statutes; those which act, without requiring the aid of any act of men; and those which ordain what men may, or may not do. Statutes of the first class are real or personal, according to the subjects of which they dispose. But to determine the nature of those, which fall within the latter description, the difficulty is greater. To arrive at this determination, he considers it necessary to examine two things: 1°. *Quel est l'état et la condition de celui à qui la permission est accordée ou à qui la défense est faite?* 2°. *La permission ou la défense sont-elles la suite, et la dépen-*

dance de l'état et de la condition de la personne, ou sont-elles contre son état et sa condition? If the permission, or the prohibition, be merely the consequence of the general state of the person, he considers the statute to be personal, although it may have an effect upon property; because that such permissions, or prohibitions, neither add to, nor take from, the general state of the person, but serve only to explain and mark what persons may or may not do according to their general state. If, on the contrary, the permission or prohibition be contrary to the general state and condition of the person, he inquires, whether that state and condition be thereby troubled and deranged, or not. In the first case, he considers the statute to be personal, and in the second case, real. (a)

128. By way of example, he states the law of the domicile, which renders a person major, and expressly permits him to perform generally all acts of civil life, or particularly such and such acts. This permission he regards as only the consequence of the state of majority and therefore personal; but that if, on the contrary, the law of the domicile, after having constituted a person major, prohibits him from performing some particular act, either this prohibition has for its object some alienation of real property, or some personal act. In the first case, he says, the prohibition is indeed, contrary to the general state of the person; but that the person is

(a) *Traité des stat. obs. 5.*

not thereby affected, nor does thereby suffer any alteration. *Non turbatur ejus conditio*. Such prohibition is therefore real. But if the prohibition made to the major has for its object some personal act, then *turbaretur ejus conditio*, and the prohibition is personal; for nothing more intimately affects the person, than the prohibition to contract a personal obligation.

129. He next proceeds to speak of the permissions or prohibitions made to minors, and asks, how it is proper to decide in these three cases? 1st If the law of the domicil, which constitutes a person minor, forbids him to make any alienation, but the law of the situation permits an alienation in some particular case; 2d or, if the law of the domicil permits him to make some particular sort of alienation, but the law of the situation prohibits minors from making any alienation whatever; 3d or, if the law of the domicil, and that of the situation, both permit the same particular acts of alienation.

130. In the first case, he is of opinion, that the minor cannot make the alienation; because the law of his domicil renders him totally incapable *par état et par condition*; and that the law of the situation does not govern the person, and cannot give capacity to the person for any acts: *nullam ab alio territorio qualitatem accipere potest*.

131. In the second case, of which he gives this example, *si la loi (du domicile) permet à un mineur de donner ses propres à son conjoint par don*

mutuel, mais que la loi de la situation le lui défend comme mineur, he is of opinion, that the law of the domicil effectually habilitates the minor for the performance of this act, which it permits; but that, as it gives to him only a particular capacity, contrary to his general state of incapacity, his general state of incapacity goes with him, and the particular capacity cannot be exerted to the prejudice of the statute of the situation, this particular capacity being *personnelle réelle*. Therefore, if husband and wife, being minors, have their domicil under the jurisdiction of a statute, which permits a mutual donation of their hereditary property, this mutual donation will not embrace immoveables, situate under the jurisdiction of a statute, which prohibits persons of this description from making such donation.

132. As to the third case, he thinks, that *summo jure*, the particular capacity, which the law of the domicil gives to the minor, cannot produce an effect in any other place; but that the law of the situation, finding the person capable of performing the act in question, and concurring with the law of the domicil, it can hardly be denied, that, *à titre de fraternité*, the law of the situation will admit the disposition made by him, who, by the law of his domicil, has the same capacity with that given by itself.

133. This author denies the doctrine, that, in order to a statute being personal, it must necessarily dispose of the universal state of the

person, that is to say, *qu'elle lui détermine un état généralement pour tous les actes de la vie civile* ; for if it were so, it would be necessary to say, that the statute, which emancipates a minor, is not personal, since although it gives him the right of administering his property, it does not grant him the power of alienating it. The *Senatus-consultus Velleianus*, which prohibits females from becoming sureties, would be also real according to the same doctrine ; for this statute forbids only one particular act, leaving to the persons affected by the prohibition, the power of making all other contracts ; yet there can be no doubt that this statute is purely personal.

134. Considering, therefore, that there are statutes, which affect the person, although confined to particular acts, while the effects of others extend to all acts, he divides personal statutes into two classes, *statuts personnels universels et statuts personnels particuliers*.

135. The first class he subdivides into those, whose effects extend to all the acts of civil society, as the statute which fixes the age of majority ; and those, whose effects extend to all the property of the person, but are confined to a particular nature of acts. Such is the emancipation of a minor, which gives the power of administration, extending over all his property, but does not enable him to sell, alienate, or hypothecate his immoveables.

136. The statutes, which he calls *personnels particuliers*, are those, which affect the person, for some particular acts only, with a capacity, or incapacity, contrary to the general state of the person. When the object of these statutes is a personal act, the statute is purely personal; when the object is property, he denominates the statutes *personnel réel*.

137. The statute, he says, is personal, inasmuch as it habilitates the person; and is real, inasmuch as this ability is confined to the disposition of a certain kind of property.

138. These statutes he considers mixed; and of these he gives as examples, the laws which permit married persons, under age, to make to each other mutual donations of property, and those which fix the age of capacity for making a testament.

139. This new class of mixed statutes results from the conclusion of this author, that those laws, forbidding the alienation of property, which are addressed to persons, whose general state is that of incapacity, are to be regarded as merely the consequence of that general state, and as being therefore of the same nature with the laws which fix that state. Thus he thinks the statute, *minor sua bona ne alienet*, to be a personal statute, as being merely declaratory of the consequences naturally dependent upon the state of minority. If, however, this statute, and others of the same nature, be in effect, real, as I expect to show hereafter,

there will be no necessity for supposing this new class of mixed statutes, which may then be admitted to be purely personal, and to have effect, by their own power and not from fraternity, in all places where the property of the person, affected with this particular capacity, may be situated, provided there be a similar statute in the place of situation. If, on the other hand, the law of the situation do not admit a like exception to the general rule, forbidding the alienation of property by minors, these statutes will not have effect there; not because the particular personal statute has not the same extended effect with the universal personal statute, but because its effect is impeded by a contrary prohibitive real statute of the situation.

140. *Boullenois* gives us these definitions as resulting from his principles.

141. The pure personal statute he defines, or rather describes as he says, in these words. *Le statut personnel est une loi, une ordonnance, un règlement, une coutume, dont les dispositions affectent la personne, soit que cette affectation imprime en elle une qualité purement politique et distinctive, soit que cette affectation ait pour objet de rendre la personne capable ou incapable, par état et condition, pour les actes du commerce civil, sans d'ailleurs parler des biens, si ce n'est par la suite et la conséquence de l'état dont l'homme est affecté.*

142. Of the statute purely real, he says, it is that, *qui affecte directement les biens en fixant leur*

sort et leur destination par une disposition particulière et indépendante de l'état personnel dont l'homme est affecté pour les actes du commerce civil, encore que quelquefois ce statut ait égard à l'état personnel que nous avons ci-devant appelé pur politique et distinctif.

143. The statute personal real is, in his system, *celui qui habilite la personne incapable par état, et qu'il ne l'habilite que pour certains biens réels.*

144. He calls these descriptions, rather than definitions, admitting them to be defective, in character of singleness and simplicity proper for definitions. These are taken from his last work. In his second work, he had given definitions of personal and real statutes, differing from those just mentioned. Not being in possession of this work, I take the definitions as they are quoted by *Bouhier* ; and by him they are stated in this way : *Le statut réel est une loi qui règle les biens sans parler de la personne ; ou qui par rapport aux biens donne à l'homme une capacité, ou incapacité, qui n'est point celle d'un état général. Et le statut personnel est une loi qui régit l'état de la personne sans parler des biens ; ou qui ne règle les biens que par la conséquence de son état.*

145. When he gave this definition of a real statute, it is evident, that *Boullenois* had not imagined the new class of mixed statutes, which he afterwards adopted ; they being embraced in this definition of a real statute. But he criticises this in his subsequent work ; and admits, that a real statute does, in no case, confer any capacity upon the person. But, as he did not admit the

particular personal statute to have the same extended effect with the universal personal statute, he resorted to the system of a new class of mixed statutes, denominated by him *personnel réel*.

146. The president *Bouhier* (a) acknowledges no other division of statutes, than that of personal and real. He rejects the definitions of *Froland* and *Boullenois*; but does not substitute any of his own. The reason which he gives, is that it is impossible to give any good definitions, so long as it is not clearly settled, what statutes ought to compose the class of personal, and what of real; he therefore divides them only according to their effects, considering the real statute to be confined within its territory, and the personal statute to have effect upon the property of the person subject to it, wherever that property may be situated.

147. This author had a strong bias in favour of the statute of the domicile; which bias was caused by an experience of the inconveniences and litigations arising from the various conflicting customs in France. He considered, that the public good required the extension of those statutes, which governed the actions of the persons, in all cases, where they were founded in natural justice and were conformable to the common law, and particularly, where they regarded *les bonnes mœurs, l'utilité et l'honnêteté publique*, with the exception, however, that they would be controlled by

(a) Ch. 23.

a contrary prohibitive real statute of the situation. In support of this principle he cites *Dumoulin*, *Coquille* and *Ricard*.

148. Upon this plan, he proposes these four rules for the distinction of personal statutes; admitting all not embraced within them, to be real.

149. His first rule is this: *Tout statut qui concerne des droits incorporels et indivisibles, doit être tenu pour personnel.*

150. This rule, he says, is founded, not only on the authority of jurisconsults, and of the laws themselves, which decide, that *incorporalia ubique suum effectum extendunt*, but upon reason, and public utility. He states, by way of example, the laws which fix the age of majority, and those which determine the age of capacity to make a testament; and asks, if it would not be highly absurd, that a person should be capable of disposing of his property, either *inter vivos* or *mortis causa*, in the place of his domicil, and should not be equally capable, in another place, where he might have property.

151. In like manner, he considers, that as the person is indivisible, so are also all those rights which are attached to the person; as, for example, his moveable, or personal property.

152. The manner, in which he intends this rule to be understood, is this; that it embraces all those statutes, *qui tendent à régler en général l'état*

et la condition des hommes, leur capacité ou incapacité, et les droits et devoirs attachés à leurs personnes.

153. The terms of this rule certainly are subject to the criticism, which *Boullenois* has made. They include predial servitudes, which are incorporeal and indivisible, but are undoubtedly real. But taken according to the intention of *Bouhier*, and explained by his commentary upon this rule, I do not see, that it can suffer any objection, except possibly in respect of the example he gives of moveable property. In this respect, his opinion is different from that of *Rodenburgh*, *Voet* and *Boullenois*. The consideration of this difference is reserved for another place.

154. His second rule is, that *tout statut qui est fondé sur une convention tacite et présumée des contractans, est personnel.*

155. This rule might have been better expressed; because, in the cases supposed, the statute precedes the convention, and is not founded upon it. The true rule I should imagine to be this, that every statute, which is made for the regulation of contracts, leaving the parties at liberty to adopt different and opposite rules from those of the statute, is personal. Such a statute acts upon the contract, and consequently can have no effect upon contracts made beyond its jurisdiction. It receives the assent of the parties and makes part of their contract. Its force is therefore derived from the consent of the parties, rather than from the law itself.

156. His third rule is that *tout statut qui renferme une prohibition aux personnes qui lui sont soumises, pour quelque cause publique, est personnel.*

157. *Boullenois* (b) admits the truth of this rule, but apprehends great difficulty in the application of it. *Cette règle est vraie, mais elle est scabreuse, et il y a à craindre que l'on n'impute à cause publique ce qui n'est fondé qu'en raison particulière et réelle.*

158. This rule appears to be in conformity with the principles of *Dumoulin*, who regards as personal those statutes, which are not made with a view to the preservation of property in families, but are founded on a public cause, *in ratione boni universi, et in causa habente concursus justitiæ naturalis, vel juris communis.* (c)

159. It also accords with the principles of *Coquille*, who considers, that the reason and motive of the law are to be principally regarded; *ut si consuetudo respiciat directò utilitatem, vel honorem, vel existimationem personarum, liget eas personas, ne possint disponere de bonis in alio territorio sitis. Quia persona ei legi alligata personaliter, eo quod domicilium in eo territorio habet, non potest exercere voluntatem suam in disponendo ultrà quam ei sua lex permittat.* (d) He therefore regards, as personal, the article of the custom of Paris prohibiting donations by

(b) *Traité des stat.* obs. 5.

(c) *Ad lib.* 1, *Cod. tit.* 1, p. 556, vol. 3, ed. of 1681.

(d) *Questions et Réponses sur les articles des Coutumes*, quest. 227.

testament between married persons, believing the object of the law to be the preservation of a sincere and true affection between married persons.

160. *Burgundus* (e) also distinguishes, between the prohibition of the Roman law against donations between husband and wife, and the prohibition of the custom of Flanders ; holding the former to be personal, by reason of its object being the maintenance of matrimonial concord and the prevention of divorces, and the latter to be real, because its objects respected only the interest of the heir.

161. The fourth rule of *Bonhier* is this : *Tout statut qui concerne les formalités extrinsèques des actes et leur authenticité, est personnel ; en sorte que quand l'acte est passé dans les formes usitées, au lieu où il est rédigé, il a partout son exécution.*

162. It is certain, that the extrinsic formalities of acts are regulated by the law of the place, where they are passed ; but it does not follow that the law is personal.

163. Having given a general and concise statement of the different systems of the principal authors, it may be expected, that I should state my own views in relation to the subject. This I shall attempt to do, with a full sense of the difficulty of the undertaking.

164. To determine the nature of a law, I consider its direct and primary object, without

(e) *Tract.* 1, n. 40 & 41.

attending to its remote and consequential effect. In pursuing the inquiry, for the purpose of ascertaining, what are the primary objects of different laws, I adopt the division of *Dumoulin*, into statutes, which relate to the solemnities and forms of acts, *nudam ordinationem vel solemnitatem actus*, and those which concern the merits and decision of causes, *quæ meritum causæ vel decisionem concernunt*.

165. The statutes of the first class, I do not consider to be either personal, real, or mixed. They do not act directly upon persons, nor upon property; but upon the act, for the purpose of determining its authenticity. The laws of some countries require, that a testament shall be made in presence of seven witnesses. In other countries, the law requires only the presence of a notary and two witnesses. These laws dispose of the solemnities of all testaments made within their jurisdiction; but they neither affect the capacity of the testator, nor do they dispose of his property. The law of the testator's domicile determines his capacity to make a testament; the law of the place, where his immoveable property is situated, determines whether it may be disposed of by testament, or not; the will of the testator disposes of his property; and the sole purpose and effect of the statute, which requires a certain number of witnesses to a testament, is to show whether that will has been expressed or not.

166. Proceeding to the consideration of those statutes, which concern the merits and decision of causes, I subdivide them, with *Dumoulin*, into those, which relate to matters of contract and contain dispositions dependent upon, and subject to be changed by the will of parties; and those, which dispose of persons, or of property, independently of the will of man.

167. Those laws, which fall within the first class, cannot be regarded as real; for their direct and primary object is not property, but contracts. They dispose of the acts of persons subject to them; and, although the act, which the disposition concerns, may have an effect upon property, yet the will of the party, rather than the mere law, is the immediate cause of this effect. They ought rather to be considered personal; inasmuch as they produce a personal obligation, which adheres to the person in all places. It is a rule, however, that personal statutes oblige only those, whose domicile is under the statute. But the law of the place of contract, rather than of the domicile, most commonly furnishes the rule for the government of contracts. These laws may therefore be considered as forming a separate class. The laws, which govern the contract of marriage, may, however, be considered absolutely personal; for the law of the matrimonial domicile, and not that of the place, where the marriage is celebrated, governs this contract.

168. In considering the statutes, which fall within the second class of this subdivision, I say, with *Rodenburgh*, that statutes dispose merely of persons, merely of things, or of both persons and things conjointly; and therefore, that they are purely personal, purely real, or mixed, and partaking, at the same time, of the nature of personality and reality.

169. Examples of the first description may be found in the laws, which fix the age of puberty in males at fourteen years and in females at ten years, which fix the age of majority at twenty-one years, and which determine what children shall be legitimate, or bastards.

170. The laws, which regulate the nature and quality of things, as those which determine what shall be considered moveables and what immoveables, those which distinguish estates into estates of freehold, or less than freehold, and others of a like nature, are purely and abstractly real. Those laws, also, which dispose directly of things, independently of any agency of man, are purely real, although they may have respect to the quality of persons. Such are the examples put by *Rodenburgh*, (a) and also these, taken from the rules of the common law of England, that inheritances shall never lineally ascend, that the collateral heir must be of the whole blood of the

(a) *Ante*, p. 85.

person last seized, that between joint tenants there is the benefit of survivorship, but not between tenants in common.

171. In these cases, the law acts directly upon persons, or upon property, and disposes of the one, or of the other, without requiring any agency of man. To determine the nature and quality of these laws, we need only look to the subject of which they dispose. If the object of the law be personal, the law will be also personal. If its object be real, the law will be real. The motive of the law is, in these cases, indifferent; and its subject is alone to be regarded.

172. Or, finally, statutes determine the power of men to dispose of their property, permitting, forbidding, or regulating, what acts they may do in relation thereto. Such are the statutes, which permit men to dispose of their property by testament, or which refuse them that liberty; those, which prohibit donations between husband and wife; those which forbid the alienation of property by married women without the consent of their husbands. Of the same nature were the rules of the feudal law, forbidding the vassal to alienate his fee without the consent of the lord, and the lord to transfer his seignory without the vassal's consent. Further instances are found in the statutes of mortmain, the statute *quia emptores* of Edward the first, the statute of uses and wills of Henry the eighth, and the statute of Charles the second abolishing the military

tenures ; and also in the laws, which allow the interdiction of prodigals and place them under the power of a curator.

173. Statutes of this nature partake of personality and of reality ; and, abstractly considered may be regarded as mixed. But as they have not the effects of both personal and real statutes, I do not believe it necessary to admit any such class as that denominated mixed.

174. These statutes are therefore either personal, or real, and the difficulty lies in determining to which class they belong. It is the province of real statutes to dispose of things, and of personal statutes to dispose of persons. *Realia quæ res ipsas dirigunt, personalia quæ personas*, says *Burgundus*. But the difficulty still remains, to know when the statute disposes of persons, and when of things ; and, therefore, the authors have generally used some emphatic qualifying expression, such as *potissimum*, *magis*, or *principaliter*, directing the attention to what should be considered the principal and leading object of the statute.

175. *Paul Voet*, considering statutes in respect of their object, says, that some are personal, and some real : *illa, quæ afficiunt personam, adeoque ei quasi adhærent ; hæc quæ rem afficiunt ; illa, quæ circa personam potissimum quid disponunt, seu in ordine ad personam ; hæc, quæ circa rem, et potissimum in ordine ad rem aliquid statuunt. Et ita fortè nulla dabuntur mixti generis statuta, quòd vel magis rem quàm personam, vel magis personam quàm rem affi-*

*ciant ; adeoque illi generi sint annumeranda, quod in
eis predominatur. (a)*

176. This, however, does not solve the difficulty. The true distinction, I believe, will be found, when we have ascertained, what is the immediate and direct object of the law, without regarding its consequential effects. If the immediate object of the law be the capacity of the person, the law will be personal, although it may also affect the disposition of property.

177. In thus considering the question I make no distinction, between those laws which fix the general state of the person, and those which render the person capable for a particular personal act ; for personal capacity can be conferred only by the law to which the person is subject, and I can perceive no good reason, why the particular capacity should not adhere to the person beyond his domicil, as well as the general capacity, or incapacity.

178. One of the cases, which *Boullenois* has supposed, of a mixed statute, is that of the *don mutuel entre conjoints mineurs*. This he considers to be both personal and real ; personal, in so far as it gives a capacity, which is confined to subjects, and real, in that, this capacity will not extend to affect property not within its jurisdiction.

179. This kind of donation has nothing in its character which resembles a donation. The

(a) Sec. 4, cap. 2, n. 3.

resemblance is in name alone. The *don mutuel* is an innominate contract, *do ut des*. The law, which enables a minor to make this contract, is, so far, clearly personal, according to the principles of *Boullenois* himself, who maintains the particular incapacity to contract a personal obligation, as in the case of the prohibition to females to become sureties, to be clearly personal. If, then, the prohibition to make a particular contract, addressed to persons in a general state of capacity, will have effect beyond the territory of the statute, why will not the permission to make a particular contract, addressed to persons in a general state of incapacity, have an equally extensive effect? I can perceive no reason, which would not be contrary to the rule, that the personal capacity must be uniform in all places. *In personam constituitur lex, quando personam afficit, et quidem primariò; nihil enim obstat, si secundariò sive per consequentiam vi legis jus aliquod vel acquirendi rem, vel disponendi de eadem tribuatur.* (a)

180. According to the opinion of *Boullenois*, the general state of a minor is a state of incapacity, and this general state adheres to the minor in all places, to which he may go, or in which he may have property, but the particular capacity, given to him by the law of his domicile, is evanescent, and fails to produce an effect beyond the

(a) *Hertius, de col. leg. sec. 4, n. 5.*

limits of that domicil. But although the general state of the person, as fixed by the law of his domicil, be that of incapacity to contract ; yet if the same law give the power to make a particular contract, there will be a modification of this general state, and the general state of incapacity, being so modified within the territory, where its character is fixed, cannot go beyond that territory, without being subject to the same modification.

181. If, then, the law of the domicil authorises married people, under the age of majority, to make to each other a mutual donation of all their property, and they make such donation : this will be valid, and will embrace all their property, wherever situated, with the exception of such immoveable property as may be situated under a contrary prohibitive real statute. Such a statute is this : *a minor shall not alienate his property*. This statute, however, *Boullenois* regards as personal. But, before entering into a particular examination of this statute, I will, upon the supposition of its being real, state my opinion of the effect of the mutual donation in the case supposed. The donation cannot have the effect of transferring the property, because the real statute of the situation, which forbids the alienation, controls the personal statute of the domicil, which permits the contract. But, as the contract creates a personal obligation, this will give a personal action, by which the other party

will be indemnified against the effects of this prohibitive real statute.

182. The case of a mere donation is widely different. This involves no personal responsibility on the part of the donor. He contracts no personal obligation. And the only question will be, whether he had the power to make such an alienation of his property. This will depend upon the laws which govern the property. If these laws do not prohibit the donation, it will be valid. If the law of the situation prohibit such donation, it will be null ; for in this case the immediate and direct effect of the law is upon the property, rendering it inalienable in this way.

183. *Boullenois* considers, that all permissive statutes, addressed to persons in a general state of capacity, and all prohibitive statutes, addressed to persons in a general state of incapacity, are to be regarded as merely statutory declarations of the consequences resulting from the general state of the person, and that they are therefore personal. In conformity with this principle, he gives, as examples, the following, which dispose of property, but only, as he says, *par la conséquence et la suite de l'état personnel de celui qui en est le propriétaire*. These are: *le mineur ne peut disposer de ses biens. Le majeur peut disposer de ses biens. La femme ne peut vendre ni aliéner ses biens, sans l'autorisation de son mari. L'interdit, le furieux, ne peuvent vendre et aliéner leurs biens. Le tuteur est l'administrateur des biens de son mineur.*

184. Such statutes he considers to be personal, being merely consequential upon the general state of the person. In this he is followed by *Merlin*. (b)

185. We will take a nearer view of these ; and first, of those which are permissive.

186. *A person, of the age of majority, may dispose of his property.* This is regarded, by *Boullenois*, as a statute, and as a personal statute ; because it only declares what is the natural and common consequence of the age of majority. The permission supposed is not that of administering only, but of alienating the immoveable property, which is a real act.

187. But, is the power of alienation, in such case, derived from any statute, or positive law ? The opinions of jurists have been divided upon the question, whether the power to dispose of property, by testament, was derived from the law of nature, or merely from the civil law. Those who maintain, that this power is not founded in natural law, but is conceded as a special favour by the civil law, support their opinion by the argument, that the testament does not take effect until the person, who made it, is no longer owner of the property ; *quia dispositio testatoris confertur in tempus inhabile post mortem, quia mors omnia solvit*, says *Decius*. (c) But the case of an aliena-

(b) *Répertoire de jurisprudence*, verb. *Majorité*.

(c) *In Cod. tit. Qui testamenta facere possint*.

tion, made by the owner of property during his life time, differs widely from a disposition, which is only to take effect at his death. The power of alienation is consequent upon the ownership, and is not merely a concession *juris civilis*, but is derived *jure gentium*. *Per traditionem quoque jure naturali res nobis adquiruntur: nihil enim tam conveniens est naturali æquitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi*, says the emperor Justinian. (d) So also Grotius, (e) treating of the mode of acquiring by alienation, says: *Homines rerum domini, ut dominium, aut totum, aut ex parte, transferre possint, juris est naturalis post introductum dominium: inest enim hoc in ipsa dominii, pleni scilicet natura*.

188. No argument against these principles can be drawn from the inalienability of fiefs by the feudal law. For by the rules of that system, the right of property was in the lord, and not in the tenant. The constitution of a fief was a contract, *contractus feudal*, between the lord and the vassal, by which the former granted the use of the land and the latter engaged to perform certain services. Such is the tenor of one of the definitions, given in the introduction to the book of Feuds, *Feudorum declaratio*, by Peter Rebuffe. *Feudum est benevola et libera rei immobilis, vel æquipollentis, concessio cum translatione utilis dominii, proprietate retenta*,

(d) §. 40, *Inst. de rerum divisione*.

(e) *De jure belli ac pacis*, lib. 2, cap. 6, n. 1.

sub fidelitate et exhibitione servitiourum honestorum. , Originally, the grants were only during the pleasure of the lord; afterwards, they were annual; and were finally allowed to descend from father to son. *Antiquissimo enim tempore sic erat in dominorum potestate connexum, ut quando vellent, possent auferre rem in feudum à se datam: postea verò cò ventum est, ut per annum tantum firmitatem haberent: deinde statutum est, ut usque ad vitam fidelis produceretur. Sed cum hoc jure successionis ad filios non pertineret, sic progressum est, ut ad filios deveniret: in quem sc. dominus hoc vellet beneficium confirmare: quod hodie ita stabilitum est, ut ad omnes æqualiter filios pertinent.* (a)

189. The power of alienating property being then derived from the law of nature, I cannot see the necessity of any such statute, as that proposed by *Boullenois* relative to the power of a person of full age, to dispose of his property, nor of any others, of the class supposed by him, and also by *Merlin*, of permissive statutes addressed to persons in a state of general capacity.

190. But although the law of nature gives to the owner of property the power of disposing of it; yet the civil law may and constantly does regulate and control this power. We will therefore consider those prohibitive statutes, which are addressed to persons, who are incapable by their general state. *Boullenois* considers these to be merely dependencies upon that state, and

(a) *Feudorum lib. 1, tit. 1, §. 1.*

therefore personal; and of the same opinion is *Merlin*. In their opinion, then, the statute, *minor immobilia ne alienet*, is personal. In the opinion of *D'Argentré*, *Burgundus*, *Voet*, *Stockmans*, and of the greater number of authors, it is real.

191. Let us, then, inquire, what is the immediate and direct object of this statute? Does it affect, *primariò et per se*, the personal capacity of the minor? Or is its immediate effect upon property? That the effect is not upon the personal capacity of the minor, is evident from the consideration, that the statute rather supposes his incapacity, and that the state of minority is *in enunciatione*, rather than *in dispositione*. The act prohibited is a real act. But the interdiction of a real act does not affect the personal capacity. The interdiction of a personal act has indeed that effect. When the law says, that a person under a certain age shall be reputed a minor, and shall be under the power of a tutor, or curator, this establishes the general state of the person. When the law further declares, that a person of that state shall be incapable of making the contract of sale, it prohibits the performance of a personal act, and the law is personal. But when the law further declares that a person, who is incapable of making the contract of sale, shall not alienate his land, it merely supposes the personal incapacity, and the prohibition falls directly upon a real act. The immediate and direct effect is then upon the land, rendering it inalien-

able by persons who are not *sui juris*. The law subjects the wife to the power of her husband, and invalidates all her acts which are not authorized by him. So far as this law prohibits her from selling, it is clearly personal. But suppose the law of the situation gives validity to an alienation made in pursuance of a void contract. Such a law will clearly control property lying within its jurisdiction.

192. Of such a law, as the one here supposed, we have before seen an instance in the statutes of *Haynault*. (b) This law *Merlin* considers to be real, although it enables a person, generally incapable, to do a particular act. His reason is founded upon this principle, that when a statute gives to a person, in a general state of incapacity, the power to perform a particular act, the nature of the act is to be alone considered. If the act be real, the statute will be real. If the act be personal, the statute will be personal.

193. *Boullenois* on the contrary, would hold this statute to be personal and real. He allows the converse of the above proposition, being of opinion, that a prohibition to do a particular act, addressed to a person *sui juris*, is real, or personal, according to the nature of the act prohibited. But he does not admit, that a statute can enable a person, not subject to it, even to perform a real act.

(b) *Ante*, p. 55

194. I cannot perceive the difference, in this particular, between the enabling and the restraining statute. If the act prohibited be a real act, the prohibition cannot affect the personal capacity; and if the act permitted be a real act, the permission cannot affect that capacity.

195. Let us, then, suppose a citizen of Paris to have held a fief in the county of Haynault, that the owner was a minor by the law of his domicil, but had attained the age, required by the law of the situation for making a valid alienation of this fief. He made a contract of sale of this fief. This would not have given to the purchaser an action *ex empto* to compel a delivery, or for damages; because of the vendor's personal incapacity to make the contract. But if the seller had given delivery, this would have been effectua., and the purchaser would have been maintained in his possession. For the laws, which govern the property, are alone competent to decide, when a valid transfer has been made; although they are utterly incompetent to decide upon the personal capacity of persons, not having their domicil within their jurisdiction.

196. This statute of Haynault is, indeed, an exception to the common rules of legislation; but it may serve as an example, to show the difference between the personal contract of sale, and the real act of transferring immoveable property. Generally, the power of alienation is refused to those, who have not the power of contracting;

and consequently the real statute of the situation is affected by the personal statute of the domicil. But the effect, of the personal statute of the domicil, is not direct upon the property in another jurisdiction. The real statute of the situation has this direct effect, when it prohibits the alienation of property, within its jurisdiction, to be made by persons, who are incapable, by the laws of their domicil, of making a contract of sale.

197. But let us consider this question in reference to the common course of legislation. The alienation of immoveable property is a real act. This is not denied by *Boulleinois*, nor by *Merlin*. The law, which forbids an alienation of such property, although it may have respect to persons, must be therefore real. The law forbids the alienation of property by minors. In making this prohibition, it does not impugn the laws of the owner's domicil. It does not fix the age of majority; but simply determines, that the land, within its jurisdiction, shall not be alienated, by a person incapable of contracting. The power to make the contract will depend upon the law of the domicil; and the contract, being there valid, will have effect upon property situated in other places, unless that effect be prevented by a real statute of the situation.

198. This doctrine appears to be in strict conformity with the rules of law, and to obviate many difficulties, and among others, the necessity of supposing a class of mixed statutes. In other

respects, the consequences will be the same as those which follow from the doctrine of *Boullenois*. The real law of the situation refuses the power of alienating, because of the inability of the owner to contract; and as that inability is imposed by the law of the domicile, we find that law to be the original cause, as the inability to alienate is the remote effect. But to judge of the character of statutes, we regard their immediate and not their remote effect. This is a principle of both *Boullenois* and *Merlin*. The difference, between my system and theirs, is not in principles, but rather in the application of principles to a particular case.

199. The following observations of *Merlin*, deserve particular attention. "*Pour juger si un statut est réel ou personnel, il ne faut pas en considérer les effets éloignés, les conséquences ultérieures : autrement, comme il n'y a pas de statut personnel qui ne produise un effet quelconque par rapport aux biens, ni de statut réel qui n'agisse par contre-coup sur les personnes, il faudrait dire qu'il n'y a point de statut qui ne soit tout à la fois et personnel et réel ; ce qui serait absurde, et tendrait à établir une guerre ouverte entre les coutumes. Que faudrait-il donc faire ? Il faut s'attacher à l'objet principal, direct, immédiat de la loi, et oublier les effets. Si l'objet principal, direct, et immédiat de la loi, est de régler l'état de la personne, le statut est personnel ; les effets, par rapport aux biens, ne sont plus que les conséquences éloignées de la personnalité. Au contraire, si l'objet principal, direct, immédiat de la loi, est de régler la qualité, la nature des biens, la*

manière d'en disposer, le statut est réel; les effets par rapport aux personnes, ne sont plus que des conséquences éloignées de la réalité. (a)

200. This author, who maintains with *Boulle-*
nois, the personality of statutes prohibiting aliena-
tions by minors, also, says, that a statute, which
permits a minor to alienate property without
taking from him the benefit of restitution, is real.

201. An example of such a statute he cites
from the custom of Valenciennes, which permit-
ted minors of the age of twenty to contract, but
did not take from them the benefit of restitution.

202. By way of illustrating his principles, he
has supposed the following case. By the custom
of Douai the children, who, at the death of their
father and mother, had attained the age of twenty,
if males, and of eighteen, if females, were held,
said the article first of the seventh chapter, *pour*
âgés, usans de leurs droits, et habiles à contracter, sans
qu'il soit besoin de leur donner curateur. If they had
not attained the age above mentioned, at the death
of their father and mother, they were to be pro-
vided with a tutor, until they should be emanci-
pated, or have attained the age of twenty-five
years. Such was the disposition of the third
article of the same chapter. In both cases, the
custom declared them incapable of alienating
their property.

(a) *Répertoire de jurisprudence, verb. Autorisation Maritale, sec. 10.*

203. At Valenciennes, however, a minor might alienate property at the age of twenty years, although he could not make a perfect contract, but with the reservation of the benefit of restitution.

204. Supposing then a person of the age of twenty years, whose father and mother are dead, to have his domicil at Douai and his estate at Valenciennes, *Merlin* asks: could he alienate it? In answering the question he distinguishes, whether the owner be in the case of the first, or of the third article of the custom. If in that of the third, that is to say, incapable by the laws of his domicil to contract or to alienate, he could not; because the alienation would not be supported by a preceding lawful title. But he says, that if the child were in the case of the first article of the custom, capable of contracting, but not of alienating, he might sell and effectually transfer the property to his vendee.

205. My principles lead to the same conclusion, but by a different course of reasoning. *Merlin* considers the statute, which prohibits the minor from alienating, to be a personal statute, and consequently to have effect upon property wherever situated. But the custom of Douai prohibits alienations by minors, and should therefore, upon his principles, restrain them from alienating their property at Valenciennes.

206. This apparent inconsistency *Merlin* attempts to obviate in this way. He says, that the personal statute of the domicil has effect in all

places, where it encounters no other opposition than a contrary personal statute; but that it yields to a contrary real statute of the place where the property is situated. The statute of the domicil, in the case supposed, being opposed to the real statute of the situation, although permissive only, and not prohibitive, must yield to this real statute.

207. We have, however, before seen, that the real statute, to control in this manner the personal statute, must be prohibitive. If the power to alienate be personal, it is difficult to perceive, how it can be conferred by a statute, to which the person is not subject. If it be real, than we can easily conceive, that the legislator, who has jurisdiction over the property, may permit or forbid its alienation.

208. We have also seen, that the permission to alienate property is not a concession of the civil law, but is derived from the law of nature; and that, when the civil law acts upon the power of alienation, it is only by imposing restraints upon that power. The custom of Valenciennes, permitting alienations by minors of the age of twenty years, I do not regard as a permissive statute; but consider the civil restriction, imposed upon the alienation of property, to have been there limited to the age of twenty.

209. In my system, the power given to minors by the custom of Douai, to contract, was personal, and the statute restraining them from alienating

property, was real. The effect of the personal statute was not confined to the territory of the custom, but extended, so as to enable persons subject to the statute, to make contracts concerning their property, wherever situated, and, among other contracts, the contract of sale. They could therefore alienate their lands situated at Valenciennes, where the law did not restrain minors, who had attained the age of twenty, from alienating. But as they were still minors by the law of their domicile, a contract of sale, made by them, would not have the effect of transferring the property in land, lying under the jurisdiction of a statute forbidding alienations by minors, such a statute being real and prohibitive, and therefore controlling the personal statute of the domicile.

210. I shall not attempt to give definitions of personal, or of real statutes; knowing the difficulty of embracing, in a single definition, all the statutes, which properly belong to either class. But the result of my system is, that those statutes, which determine the nature and qualities of things, which subject immoveables to certain charges, which dispose directly of immoveables independently of the agency of man, and which regulate, limit, and restrict, the power of the owner, to alienate his immoveable property, or to dispose of it by testament, are real. (b)

(b) *In his que concernunt rem, vel onus rei, debet inspicere consuetudo loci ubi sita res est.* Dumoulin, in *antiqua consuetudine Paris*, tit. *de fiefs*, §. 12, gl. 7, n. 37.

211. In the class of personal statutes I place all those, which fix the general state and condition of persons, which determine their capacity for the performance of personal acts, which regard their personal rights and obligations, and which regulate those things which are attached to the person.

212. In the number of personal statutes I put those, which concern the disposition of moveables. These have no fixed situation, but are attached to the person of the owner. From their capacity of being transported from place to place they are styled moveable; and from the circumstance of their destination being always subject to the will of the owner of them, they are considered, by a sort of fiction, to be adherent to his person, and to partake of the same nature with it. They are therefore governed by the same laws, which govern the person, that is to say, by the laws of their owner's domicil. Accordingly, *D'Argentré*, (c) *Burgundus*, (d) and *Bouhier*, (e) consider these laws to be personal; and, by the common law of England, such property is designated as personal property.

213. There are other authors, (f) who regard the laws, which dispose of moveables, as real.

(c) *In antiq. cons. Brit. art. 218, gl. 6, n. 3.*

(d) *Tract. 1, n. 2.*

(e) *Chap. 25, n. 2.*

(f) *Rodenburgh. de jure quod oritur, &c., tit. 1, cap. 2, in fin.; Voet, de statutis, sec. 4, cap. 2, n. 2.; Boullenois, des démiss. quest. 6.*

These authors will not admit any statute to be personal, which does not affect the person; and as the laws, which dispose of moveables, do not add to, nor take from, the capacity of persons, they do not consider such laws to be personal. They agree, however, that moveables are governed by the same laws, which govern the person of the owner; but they maintain, that this rule is founded on a different consideration, to wit, that, by a fiction of law, moveables are always supposed to be in the place of the owner's domicil. The difference is, therefore, merely nominal. Whether these laws are styled real, or personal, it is universally admitted, that they have the effect of personal statutes. (g) *De mobilibus alia censura est, quoniam per omnia ex conditione personarum legem accipiunt, et situm habere negantur, nisi affixa et coherentia, nec loco continere dicuntur propter habilitatem motionis et translationis. Quare*

(g) Baldus, in *l. mercatores*, *Cod. de Commer.*; Peckius, *de testamentis conjugum*, lib. 4, cap. 35, n. 7; Loisel, *inst. cout. liv. 2, tit. 1, n. 13*; Boullenois, *traité des stat. obs.* 19; Henrys, lib. 4, ch. 6, *quest.* 105; Voet, *ad pand. lib. 38, tit. 17, n. 34*; Casaregis, in *rub. stat. Gen. de success. ab intest. n. 63*; Bynkershoek, *quest. jur. priv. lib. 1, cap. 16*; Vinnius, *select. jur. quest. lib. 2, cap. 19*; Christinæus, *ad leg. Mech. tit. 16, art. 39, n. 2*; & *Dec. Curia Belgica, Vol. 1, dec. 118, n. 11*; Mornac, *ad l. justissimè*, 140, *ff. de edil. edict*; Dumoulin, *sur l'article 9 Montreuil*, 140 *Sênlis*, 254 *Orléans*, 41 *Auvergne*; Bacquet, *droits de justice*, ch. 13, n. 5. Brodeau *sur Louët, let. R. Som.* 31, n. 7.

statutum de bonis mobilibus verè personale est, et loco domicilii iudicium sumit, et quodcunque iudex domicilii de eo statuit, ubique locum obtinet. (h)

214. The succession of immoveable and of moveable property will be therefore sometimes governed by different rules of law. Immoveable property is always inherited, according to the rules prescribed by the laws of the country, in which it is situated. The distribution of moveables will be directed by the laws of the place, in which the last owner had his domicil at the time of his death. This has been so decided by Lord *Hardwicke*, (i) Lord *Mansfield*, (k) the house of Lords, (l) and the supreme court of the *United States*; (m) and may be considered as a rule which is not disputed. (n)

215. It would seem to be a further consequence of this rule, that the laws of the owner's domicil should determine the inquiry, into the validity of any alienation of personal property. We have seen, that the validity of any alienation of immoveable property must be determined, by the laws of the place where the property is situated. The reason is, that such property has a fixed location, and is under the government of

(h) *D'Argentré, loc. cit. n. 30.*

(i) *Pipon vs. Pipon*, Ambl. 25.

(k) *Burn vs. Cole*, Ambl. 415.

(l) *Bruce vs. Bruce*, 2 Bos. & Pul. 229, n.

(m) *Dixon's ex. vs. Ramsey's ex.*, 3 Cranch, 319.

(n) See the case of *Harvey vs. Richards*, 1 Mason, 403, and the cases there cited by judge Story.

real statutes. But personal property has no location, and, in general, is subject to be disposed of, by no other laws than those which govern the owner's person. Although, by the owner's disposition, such property may be temporarily placed within the limits of a different jurisdiction; yet, as in the case of the person temporarily absent from the place of his domicile, its destination is not thereby changed, but is considered still to be subject to the laws of the domicile. In both cases, of the person and of his moveable property, they may be, to a certain extent and for certain purposes, subject to the laws of the foreign State, in which they may casually be. Both are subject to the general laws of police. The person is answerable for offences; and the goods may be liable to confiscation. As every sovereign legislator may also prohibit the entrance of foreigners and of foreign goods into his dominions; so also, he may, as the condition of admitting them, render them more entirely subject to his local regulations, than is done by the general rules of law. But any extraordinary legislation of this nature is not to be presumed among civilized nations, and unless a contrary intention of the legislator be clearly expressed, or strong reasons exist from which it must be inferred, the disposition of moveables will depend upon the laws, to which they are commonly subject. The reason is, that regularly they are not subject to the disposition of any other statutes, than those of their owner's domicile;

and *statuta in non subditos jurisdictioni statuentium non disponunt.*

216. This principle, that the disposition of personal property is governed by the laws of the owner's domicil, is not of modern invention. Its age is not less than five centuries. It is not a rule maintained by one or two nations, nor has it grown out of the peculiar interest, or policy, of any one nation, as has been intimated by a learned judge. (o) On the contrary, we have reason to believe, that it has received the general approbation of juriconsults and judges in every nation of modern *Europe*. *Tanquam mobilia sequantur personam, sive domicilium illius cujus sunt, licet immobilia respiciant territorium in quo sita sunt.* This is affirmed, with great clearness and force by Lord *Loughborough*, in delivering the judgment of the court of common pleas, in the case of *Sill vs. Warwick*. (p) His lordship states it to be "a clear proposition, not only of the law of *England*, but of every other country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession, or the act of the party, it follows the law of the person."

(o) 12 Wheaton, 360.

(p) † H. Bl. 690.

217. I am, therefore, inclined to think, that this rule has been aptly styled, a rule of international law; although a learned judge has questioned the propriety of the phrase. (q) The rules, which civilized man in modern nations has recognized, as having a binding force upon the consciences of sovereigns, and which form the code styled the law of nations, have their foundation in general utility, and in the general tacit approbation and acquiescence of nations. Is not this rule strongly based on the same foundation? The personal qualities and capacities of men are fixed by the laws of their domicil; and, being so fixed, go with them into all other jurisdictions. This is admitted, because of the great confusion and inconvenience, which would be the result of not admitting this principle. (r) Similar inconveniences would result, from subjecting moveables to all the local regulations of the countries, to which they may be occasionally destined. These evils would sometimes fall upon the citizens of one country, and at other times upon the citizens of another. Legislators (s) and juriconsults have been, therefore, sensible of the utility and necessity of admitting but one *forum*, for the

(q) 20 John. Rep. 263.

(r) *Ante*, p. 28.

(s) We find the rule expressly laid down in several of the ancient customs of France, *les meubles suivent le corps*. Rheims, art. 21; Lile, 6; Boullenois, 156; Amiens, 96; Châlons, 40; Vermandois, 86.

determination of the questions relating to this species of property, and that is the *forum* to which the owner is personally subject. These inconveniences have been stated, by judge *Story*, in his admirable judgment in the case of *Harvey vs. Richards*, (t) with so much precision and force, that, although I have generally abstained from quotations, except from books rare and difficult to be procured, I am induced to state these in his own words. "A person may have moveable property and debts in various countries, each of which may have a different system of succession. If the law *rei sitæ* were generally to prevail, it would be utterly impossible for any such person to know, in what manner his property would be distributed at his death, not only from the uncertainty of its situation from its own transitory nature, but from the impracticability of knowing, with minute accuracy, the law of succession of every country, in which it might then happen to be. He would be under the same embarrassment, if he attempted to dispose of his property by a testament; for he could never foresee, where it would be at his death. Nay more, it would be in the power of his debtor, by a mere change of domicil, to destroy the best digested will; and the accident of a moment might destroy all the anxious provisions of an excellent parent for his whole family. The nation itself, to which the

(t) 1 Mason's Rep. 412.

deceased belonged, might be seriously affected by the loss of his wealth, from a momentary absence, although his true home was in the centre of its own territory. These are great and serious evils, pervading every class of the community, and equally affecting every civilized nation. But in a maritime nation, depending upon its commerce for its glory and its revenue, the mischief would be incalculable. The common and spontaneous consent of nations, therefore, established this rule from the noblest policy, the promotion of general convenience and happiness, and the avoiding of distressing difficulties, equally subversive of the public safety and private happiness of all."

218. May not inconveniences equally great attend the subjection of the alienation of personal property *inter vivos* to the various conflicting regulations of different states? The facility of making transfers of personal property is the very life of commerce. It is for this reason, that the endorsement of bills of lading has been held to transfer property and to defeat the right of a former vendor to stop the goods *in transitu*. But if a ship, or cargo, cannot be sent to a particular port, or generally in search of a market, without depriving the owner of the right of transfer, free from the hazard of such transfer being declared void, by the laws of a place, to which the ship and cargo may be destined, or to which they may be forced by stress of weather, or other accidental

cause, the business of commercial men will be greatly embarrassed and impeded. To be deprived of the power of disposing of my property, during my life time in the mode prescribed by the laws to which I am subject and with which I am supposed to be conversant, can hardly be considered to be less embarrassing, than to have my dispositions *post mortem* disturbed. Beside which it must be considered, that the law is a science depending upon principles, and not a collection of unconnected rules for the decision of particular cases. If, therefore, personal property is to be distributed *ab intestato* by personal laws, the alienation of it *inter vivos* must, for the same reasons, be also governed by personal laws.

219. In consequence of a difference, between the rules of the civil law, and those of the common law of *England*, relative to the transfer of property, several cases have arisen in the courts of the state of *Louisiana*, which involve the principles now under consideration. By the common law of *England*, the property passes to the vendee, by the contract of sale, and before any delivery be made. The retaining of possession, by the vendor, is considered evidence of fraud, and will avoid the sale, as against creditors and subsequent purchasers. But to this rule there is an exception, where, at the time of the sale, the property is abroad and incapable of delivery; for then the possession of the vendor is considered constructively as the possession of his vendee,

who is only bound to use reasonable diligence to obtain actual possession. By the Roman law, on the contrary, the property was alone transferred by delivery; and although, as between the seller and purchaser, a different rule is established by our code, yet as far as the interests of creditors and subsequent purchasers are concerned, the old rule remains in force.

220. The first case, involving this conflict of laws, was that of *Norris vs. Mumford*. (a) That was a case where a merchant residing in New York sold a quantity of cotton, then stored in New-Orleans, to another person in New-York; but, before delivery could be made, the cotton was attached at the suit of a creditor of the vendor; and, the purchaser having made a claim, the court decided in favour of the attaching creditor. The same point was afterwards decided in several cases. (b)

221. The correctness of these decisions admits of some serious doubts. It is a certain general principle, that personal property has no locality, and that it is to be disposed of according to the laws of the owner's domicil. When therefore Caius, residing in Boston, had, according to the laws of that place, made to Titus a

(a) 4 Martin's Rep. 20.

(b) *Ramsay vs. Stevenson*, 5 Martin, 23; *Fisk vs. Chandler*, 7 Martin, 24; *Olivier vs. Townes*, 2 Martin, N. S. 93.

complete alienation of a ship, or any other moveable, it would seem, that such moveable property could no longer be subject to attachment for the debts of Caius. To this it may be answered, that all sovereign states may refuse to admit articles from other places, and may therefore annex as a condition of such admission the obligation of being governed by their own laws. This answer, I conceive, would be conclusive, when applied to the regulations of a sovereign state. In such a state it might properly be said, that the law, which requires moveables to be actually delivered in order to complete the transfer of property, is made for the benefit of third persons, for the protection of creditors and innocent purchasers. It must be consequently inferred, that it was the intention of the legislature to apply the provisions of this law to all property, whether belonging to citizens or strangers; and that it is to be thus considered, that all moveables found in the state shall be taken to belong to their apparent owner, the person in possession. (c)

(c) This reasoning would not support the case of *Thuret vs. Jenkins*, 7 Martin, 318. In this case the court supported the claim of the vendee upon a sale made in New-York, upon the ground of the vessel being at sea at the time of the sale, although she arrived in New-Orleans two days only after its date, and was immediately attached. This is a distinction without a difference; and can only be maintained, by denying all the authorities, which have settled the point, that moveable property has no locality.

222. But to this it may perhaps be replied, that the case supposed does not exist. Louisiana is not a sovereign state. The states of this union have certain sovereign powers; but they are only sovereign *sub modo*. They are subject to the constitution of the United States, and to the treaties and laws made under that constitution. No one of them can either refuse to receive the persons, or the goods, of the citizens of other states, or of the subjects of foreign nations in amity with the United States. They can lay no impost upon such merchandise; nor can they annex conditions to its admission, which would have the effect of an exclusion. Nor do I believe, that they can constitutionally take the goods of one man to pay the debt of another. They have, indeed, a certain jurisdiction over such merchandise, such as is conceded and acknowledged by the general principles of law. They may render such property liable for the owner's debts. They may by means of it entertain jurisdiction of a suit against the owner, so as to affect him to the extent of the property. They may also determine, what liens may be acquired upon such property by reason of contracts made within their jurisdiction. These are usual and proper subjects of legislation; and very different from taking my property from me and applying it to the payment of another man's debts. The former owner of the moveable having made to me a complete transfer of the property accord-

ing to the laws of his domicil, it is mine; and if it shall be decided not to belong to me by the judges of another state, because the transfer has not been made in pursuance of the laws of such state, then am I divested of my property by the operation of laws to which it was not subject.

223. As to the validity of a transfer of moveable property, there is no difference, in this respect, between an assignment by the act of the party, and a transfer by operation of law. The power of a testator to dispose of his personal property by will, and the mode of distribution of the personal property of a person deceased intestate, will be equally determined by the law of the domicil. A marriage, contracted between citizens of Massachusetts, is a gift in law to the husband of all the personal property of the wife, and will not only effectually transfer to him, all such of her moveables as may at the time be actually within the state of Massachusetts, but will equally vest in him the title to all her property, of that description, which may then be in the state of Louisiana, where marriage has no such consequence.

224. Assignments under the bankrupt laws would seem to fall within this principle, and so have been considered generally, if not universally, in Europe. In the year 1723, Lord *Talbot*, then at the bar, gave an opinion, that although the statutes of bankruptcy did not extend to the plantations, yet that the personal property of an

English bankrupt, in the plantations, passed to the assignees. (a)

225. From that time to the present, this opinion has been maintained by the courts in Westminster Hall, as will appear by a review of the cases.

226. A question of this nature came before Lord *Hardwicke* in the bankruptcy of captain *Wilson*, of which a statement is given by Lord *Loughborough*, in giving the judgment in *Sill vs. Warwick*. (b) In that case there were three different sets of creditors in Scotland, who claimed, in opposition to the English assignees, the amount of considerable debts due to *Wilson* in Scotland. By the law of Scotland debts are assignable, and an assignment of a debt notified to the debtor, which is technically termed an intimation, makes a specific lien *quoad* that debt. An assignment of a debt, not intimated to the debtor, gives a right to the assignee to demand that debt; but it is a right inferior to that of the creditor, who has obtained his assignment and intimated it. Some of the creditors had assignments of specific debts, intimated to the debtors prior to the act of bankruptcy. Others had assignments of debts not intimated before the bankruptcy. Others had proceeded by process of arrestment, as it is called in the *Scottish* law, or, in other words,

(a) Published in *Beawes' Lex Mercatoria*, page 516 of the 8th edition.

(b) 1 H. Bl. 691.

had attached the debts, after the commission of the act of bankruptcy. Lord *Hardwicke* and the Court of Session, entirely concurred in the opinion, that the creditors, who had specific assignments of debts with intimation to the debtors, stood in the same situation as creditors claiming by mortgage antecedent to the bankruptcy. All therefore he could do with respect to them was, to refuse to admit them to come in under the commission, unless they accounted for what they had obtained under their specific security. With respect to the next class of creditors Lord *Hardwicke* was of opinion, as was also the Court of Session, that their title by assignment was preferable to the title by arrestment; and they likewise held, that the arrestments being subsequent to the bankruptcy were of no avail, the property being by assignment vested in the assignees under the commission.

227. Upon the same principle was decided a cause arising on the lunacy of Mr. *Morrison* before the House of Lords, in 1749. In this case it was decided, that the committee, appointed under a commission of lunacy in *England*, had a right to sue for and recover his property in *Scotland*, equally as if they held under his voluntary assignment. The principle appears then to have been fully settled in the time of Lord *Hardwicke*, and to have been recognized as a rule of international law, and to have been applied to intestate estates, bankrupt estates, and estates of lunatics.

228. In the year 1764, the case of *Solomons vs. Ross* (c) came before Mr. Justice *Bathurst* sitting for Lord Chancellor *Northington*. The parties were merchants in *London* and correspondents of Messrs. *Deneufvilles* merchants and partners in *Amsterdam*. On the 18th of *December* 1759, the *Deneufvilles* stopped payment; on the 1st of *January* 1760, the chamber of desolate estates in *Amsterdam* took cognizance thereof, and on the next day they were declared bankrupts, and curators appointed to their estates and effects. *Ross* was a creditor of the bankrupts, and two days after they had stopped payment he made an affidavit of his debt in the mayor's court of *London* and attached their effects in the hands of *Michael Solomons*, who was indebted to them. *Ross* obtained judgment by default on the attachment, and an execution issued against the garnishee, who being unable to pay gave his note for the amount payable in a month. A few days afterwards *Israel Solomons*, who had a power of attorney from the curators to act for them in *England*, filed a bill in his own name and that of the curators, praying that the garnishee might account as debtor to them and be restrained from paying *Ross*. The garnishee filed a bill of interpleader and paid the money into court. It was decreed, that the money should be paid to *Israel Solomons*

(c) 1 H. Bl. 131, *in notis*.

for the benefit of the creditors of the bankrupts, and that the note should be delivered up by *Ross* to be cancelled. This cause was cited in argument before Lord *Loughborough*, who then said, that he was counsel in the cause. There can therefore be no doubt of the accuracy of the report; and as has been observed by Chancellor *Kent*, (d) it is "a strong and interesting decision, applying, in favour of other nations, the rule which *England* asks for herself." Lord *Loughborough* said, that this case was decided solely on the principle, that the assignment of the bankrupt's effects, to the curators of desolate estates in *Holland*, was an assignment for a valuable consideration, and therefore acknowledged in *England*, agreeable to captain *Wilson's* case in the House of Lords.

229. The next case was *Jollet and Reitveld vs. Deponthieu and Baril*, (e) which came before Lord Chancellor *Camden*, in 1769. The *Deneufvilles* merchants at *Amsterdam* (but not those mentioned in the preceding case) stopped payment on the 30th of *July*, 1763. On the 8th of *October* following, the plaintiffs were appointed curators of their estate and effects. At this time, the bankrupts owed the defendant *Deponthieu* 1600*l.*, and the Defendant *Baril* owed the bankrupts 2131*l.* In *January*, 1764, *Deponthieu* attached this debt in the hands of *Baril*. Pending the attachment, the

(d) 4 John. Chan. Cas. 475.

(e) 1 H. Bl. 132, n.

curators filed their bill for an account between the bankrupts and the defendant *Baril*, and that the balance might be paid to them, and that the defendant *Deponthieu* might be restrained from proceeding on the attachment. It was decreed, that the plaintiffs recover the balance due, and that a perpetual injunction issue against proceeding on the foreign attachment.

230. The case of *Neale* and another, assignees of *Grattan*, vs. *Cottingham* and *Houghton*, (f) came before Lord Chancellor *Lifford* in *Ireland* in 1764. *Grattan*, a merchant in *London*, was indebted to the defendant *Cottingham*, a merchant in *Dublin*, and the defendant *Houghton* was indebted to *Grattan*. On the 27th of *October*, 1763, *Cottingham* brought an action against *Grattan*, and on the 31st of that month, attached the debt in the hands of *Houghton*. On this attachment judgment was rendered, and in *January*, 1764, the garnishee was taken in execution and paid the debt. On the 28th of *October*, 1763, a commission of bankrupt issued against *Grattan* in *England*, and he was on that day declared a bankrupt. On the 10th of *November*, 1763, his effects were assigned to the plaintiffs, who in *November*, 1764, filed their bill in the Court of Chancery in *Ireland*, praying for an account of the monies received by *Cottingham* from *Houghton*, and that *Cottingham* might be

(f) 1 H. Bl. 132, n.

decreed to pay it. The Lord Chancellor called in the assistance of the judges, and after great consultation, he, with their approbation, decreed in favour of the plaintiffs, and ordered *Cottingham* to pay the money to them.

231. The case of *Hunter vs. Potts* (a) was decided by the court of King's Bench in 1791, after an elaborate argument and examination of the cases and of many authorities cited from the writings of civilians. The principal point decided was, that if, after assignment of a bankrupt's estate, a creditor, knowing of it and residing in *England*, attaches the money of the bankrupt abroad, the assignees may compel him to refund it as so much money received to their use. The court entered fully into the general doctrine and decided, that the assignment, which was executed by the commissioners of the bankrupt, was sufficient to vest the bankrupt's property in *Rhode Island*, in the same manner as if the owner had assigned it by his own voluntary act, unless there was a positive law, in the place where the property was, to prevent it.

232. The case of *Sill vs. Warwick* (b) was decided by the court of Common Pleas shortly after the last named case. The direct point decided was the same; but the Chief Justice entered very fully into the general doctrine, which he

(a) 4 T. R. 182.

(b) 1 H. Bl. 665.

discussed with much force and ability. After stating the general principle, that personal property is governed by the law of the country which governs the person of the owner, he said, that the condition of a bankrupt by the law of *England* is "that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property, (c) which lies out of the jurisdiction of the law of *England*, if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country have been uniform to admit the title of foreign assignees." His opinion was, that the claim of the assignees was to be preferred to that of all other creditors, who had not acquired a specific lien, prior to the commission of the act of bankruptcy; and that in this case, if the assignees had sent to *St. Christophers* a person to act for them and had given notice of the assignment, the court at *St. Christophers* ought to have preferred the title of the assignees to the claim of the creditor using the process of attachment. He does not, however, deny, that the law of the

(c) Meaning personal property.

country, in which the personal property may be, may entertain jurisdiction over that property, and by express regulation may prefer the claim of the attaching creditor to the previous assignment by the operation of the bankrupt laws, although he should consider such a determination wrong and contrary to well established principles of the law of nations.

233. The case of *Phillips vs. Hunter* (d) was upon the same point, and having been decided by the court of King's Bench in conformity with the judgment in *Hunter vs. Potts*, a writ of error was brought into the Exchequer Chamber, and the judgment was there affirmed, by the opinion of all the judges except one.

234. The case of the bank of *Scotland vs. the assignees of Scott, Smith, Stein & Co.*, was decided by the Court of Session in *Scotland* in 1813. (e) In this case the court declared the law to be, that an *English* commission of bankruptcy vested in the assignees all the personal property of the bankrupt, wherever the same might be, and that creditors in *Scotland* could not, after such assignment, attach or sequester their debtor's personal effects in *Scotland*. Lord *Robertson*, in giving his opinion, observed, that it was a question of great importance, what was to be the effect in *Scotland* of an *English* commis-

(d) 2 H. Bl. 402.

(e) This case is reported in 1 *Rose's Cases in Bankruptcy*, 462. Not having the book, I take the case from the account given of it by Chancellor *Kent* in *Holmes vs. Remsen*, 4 *John. Chan. Cas.* 480.

sion of bankrupt; that they had clear principles of international law to govern them, and to which they ought to adhere, unless they were to throw into confusion the whole system of the bankrupt laws. That the effect to be given to such a commission in every country, where the true principles of international law were understood, was, that it must carry the whole effects belonging to the bankrupt, and that the subsequent *Scotch* sequestration could not be permitted to control the commission. That moveables followed the person of the owner, and their condition was governed by the law of his domicil, a fiction introduced upon the soundest principles of justice; and in practice attended with the most beneficial consequences. The other judges gave their opinions to the like effect; and Lord *Meadoubank* said, that this rule had been so long recognized it might be considered a principle of the law of nations, and that a departure from it would be attended with inextricable confusion.

235. The case of *Selkraig vs. Davis* (f) upon the same point was subsequently decided by the Court of Session, and the decision affirmed by the House of Lords upon appeal. In this case it was declared to be the settled law in *Scotland*, founded on a principle of international law, that the assignment under an *English* commission of bankruptcy vests in the assignees, without any intimation, all the personal estate of the bankrupt in

(f) 2 Dow, 230; 2 Rose's Bank. Cas. 291, S. C.

Scotland. In this case a commission had issued against a person, who owned a number of shares of *Carron* stock, and a *Scottish* creditor having arrested those shares, it was held that the title of the assignees was preferable. It was likewise held, that the commission did not affect real property in *Scotland*. It was observed in argument, that it had been repeatedly decided, that a foreign commission, passed the effects in *England* to the foreign commission, and the presumption was, that such was the law of all the world. That when it was said, that the property of the bankrupt abroad might be attached, notwithstanding the commission, it meant only that the law of *England* could not be administered in foreign countries, and that the law of a particular state might form an exception to the general rule among civilized nations. That if two nations were at war, it might be doubted whether a commission in one country would prevent the effect of an attachment in another, where the attaching creditor could have no benefit under the commission, and the only distinction was, whether the creditor could have his remedy. Lord *Eldon* said it was clear, that the *English* commission passed the personal property in *Scotland*, and in all other parts of the world; and there was no authority, or *dictum*, to the contrary. A general assignment by a bankrupt of all his effects, for the benefit of all his creditors, operated like a transfer by marriage in *England*, which rendered the *Scotch* property

of the wife her husband's, without the necessity of notice.

236. After this review of the cases decided in the *English* courts I believe it will not be disputed, that there is a well settled rule upon the subject there established, and that the same was clearly fixed before the independence of these states. So generally was it received as a rule of international law, that Lord *Thurlow* heard with surprise, in 1787, that some of the states in *America* did not respect the title of the assignees under an *English* commission. He said, that "he had no idea of any country refusing to take notice of the rights of the assignees under their laws, and he believed every country on earth would do it, besides." (g)

237. This rule is, that the committing of an act of bankruptcy divests the debtor of his property and vests it in the body of his creditors, or in such persons as they may afterwards elect to be assignees. It is not the commissioners' assignment, but the act of bankruptcy which fixes the period, after which particular creditors are not allowed to gain advantages. It is on this ground that it is likened to a voluntary assignment, not in opposition to an assignment for a valuable consideration, for this is supported by a just consideration, but because the committing of the act of bankruptcy is the voluntary act of the

(g) *Ex parte* Blakes, 1 Cox, 398.

bankrupt, to which the law of the country to which he is personally subject ascribes certain effects. This is in conformity with the opinion of Lord *Mansfield*, that every man's assent is to be presumed to a statute; (i) and also to that of Chief Justice *Parsons*, (k) who considered the assignment under the bankrupt laws as the party's own act, since it was in execution of laws by which he was bound, and since he voluntarily committed the act which authorized the making of it.

238. The Supreme Court of the state of *New-York* declared in one case, (a) that it was "a general practice among nations, to admit and give effect to the title of foreign assignees. This is done on the ground, that the conveyance under the bankrupt laws of the country where the owner is domiciled, is equivalent to a voluntary conveyance by the bankrupt; and that the general disposition of personal property by the owner in one country will affect it every where, because, in respect to the owner's control over it, personal property has no locality."

239. In 1820, the question came before the Court of Chancery in the same state; and Chancellor *Kent* there entered into a masterly discussion of the principles, and after full consideration of the matter and an examination of the authori-

(i) *Wadham vs. Warlow*, 1 H. Bl. 437, n.

(k) *Goodwin vs. Jones*, 3 Mass. Rep. 517.

(a) *Bird, Savage & others vs. Caritat*, 2 Johnson's Rep. 344.

ties, he held, that an assignment, by the commissioners of bankrupts in *England*, of all the estate and *choses in action* of a bankrupt, passed a debt due by a citizen of *New-York* to the bankrupt; and that the title of the assignees should be preferred to a subsequent attachment. (b)

240. Subsequently another cause between the same parties was decided by the Supreme Court of the same State. (c) In this case *Platt, J.* delivered an elaborate opinion against the doctrine maintained by the Chancellor. His argument appears to me rather political than legal, and to be founded upon the apprehension of inconveniences to be experienced by our own citizens, in being obliged to receive their dividends in *England*, and in some notion of national inequality resulting from the rule, rather than upon principles of law. The cause was decided upon another point, and the other judges declined expressing an opinion upon this.

241. Chancellor *Kent*, in a work lately published, with the spirit of candour and freedom from any pertinacity for his own opinions for which he is remarkable, admits that the weight of *American* authority is entirely against his opinion; and he says, "it may now be considered as part of the settled jurisprudence of this country, that a prior assignment in bankruptcy, under a foreign

(b) *Holmes vs. Remsen*, 4 Johnson's Chan. Cas. 460.

(c) *Holmes vs. Remsen*, 20 Johnson's Reports, 229.

law, will not be permitted to prevail against a subsequent attachment by an *American* creditor of the bankrupt's effects found here; and that our courts will not subject our citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control." (d)

242. From an examination of most of the cases on which this admission is founded I cannot avoid thinking, that this able and learned author has ascribed to them too great an effect. Two cases are cited from the decisions of the courts in the State of *Maryland*. In the first of these (e) nothing was decided, but that an *English* creditor of an *English* bankrupt could not attach the personal effects of the bankrupt in *Maryland*. By what process of reasoning can it be made to appear from this case, that an *American* creditor could have laid such an attachment? Nothing is said by the court, from which this may be inferred. But the reporters have published an opinion of Mr. *Dulany* upon another case, in which that celebrated lawyer says, that this case shows that a *British* creditor cannot maintain an attachment in such case, although he thinks that a *Marylander* might. His reason is, that if it were held otherwise *British* merchants would not have credit in *Maryland*. Surely not a very suffi-

(d) Commentaries on American law, vol. 2, p. 330.

(e) *Burk & others vs. McLean, 1 Harris & McHenry, 236.*

cient reason for such a distinction; and I am at a loss to understand how such a distinction can be supported, unless the laws of the province denied the benefit of the attachment laws to all but residents. The other case (*f*) referred to, was decided in 1790. Of this it may be observed, that no such question as that under discussion was there stated or discussed. The only question argued was, whether a debt due to three partners could be attached for the private debt of one. The attachment was sustained. The case is surely not law. The partners were *English* bankrupts, and the partnership property was bound for the partnership debts. Nothing was liable to attachment for the debt of one of the firm, but his interest in the fund, and this could be nothing when there was not enough to pay the debts of the firm.

243. Another case (*g*) referred to was decided in the State of *Connecticut* in 1787. After a verdict for the plaintiff, the defendants moved in arrest of judgment that they were uncertificated *English* bankrupts. The court overruled the motion, saying that this would be no defence in *England*, and if it was that it should have been pleaded. This was a very sufficient answer, and was all that the case required. But the court further said, that a commission of bankrupt against defendants in *England* would not secure their effects in *Connecti-*

(*f*) *Wallace vs. Patterson*, 2 H. & McH., 465.

(*g*) *Taylor vs. Gear & others*, Kirby's Rep., 313.

ent, but that they remained as before transferable by them and liable to attachment. This observation was wholly unnecessary for the decision of the case then depending, and can be regarded only as an *obiter dictum* inconsiderately thrown out.

244. In each of the States of *North* (a) and *South Carolina*, (b) there appears to have been a decision in favour of the attaching creditor against the title of assignees under an *English* commission of bankruptcy. Not having seen the reports of these cases, I am unable to form an opinion how far they are in point, nor of the weight to which they may be entitled.

245. A decision to the same effect was rendered by the Supreme Court of the State of *Pennsylvania* (c) in 1814, by the opinion of two judges, against one who dissented. This case was fully discussed; but seems to have been decided principally upon political considerations, and upon the authority of the case of *Harrison vs. Sterry*, (d) decided by the Supreme Court of the *United States* in the year 1809. This question does not appear to have been argued in the case cited; and all that we find relative to it is in these words of the Chief Justice. "As the bankrupt law of a foreign country is incapable of operating a legal transfer of

(a) *McNeil vs. Colquhoun*, 2 Haywood, 24.

(b) *Topham vs. Chapman*, 3 Constitutional Reports, 283.

(c) *Milne vs. Moreton*, 6 Binney, 353.

(d) 5 Cranch, 289.

property in the *United States*, the remaining two thirds of the fund are liable to the attaching creditors, according to the legal preference obtained by their attachments."

246. Upon this case it has been observed by Mr. Chancellor *Kent*, that it is not "to be presumed, that any court intends either to establish, or reject, a litigated point of law, of great importance, merely by a dry decision, unaccompanied with argument or illustration." The highest respect is certainly due to the judgments of the Supreme Court of the *United States*; and all lawyers unite in venerating the great abilities and excellent judgment of the great magistrate, by whom the opinion was delivered in this case. It is, however, a matter to be lamented, that he has not entered into the full investigation of a question so worthy of the entire exertion of his great faculties. He seldom fails in a complete demonstration of any legal proposition, which he attempts to establish; and, in this instance, it may be presumed that a full examination of all the authorities, including the opinions of civilians as well as of the judgments of the *English* courts, would have resulted, either in a different judgment, or in an argument, to the power of which we should have all yielded. As this has not been done, we may be permitted to express a doubt, whether the authority of this case can prevail, against the unanimous opinion of civilians and of so many great *English* judges, whose decisions have been cited. The

distinction, between immoveable and moveable property, does not seem to have been adverted to. The bankrupt laws of *England* are undoubtedly incapable of operating a legal transfer of property in the *United States*. But this proposition is to be understood to apply to such property, as, in contemplation of law, is in the *United States*. Moveable property of a person, whose domicil is in *England*, is not so understood. On the contrary, it is understood to reside with the owner, and to be governed by the laws to which his person is subject.

247. As an exception to the general proposition it is, however, admitted, that the presence of the personal property confers jurisdiction to a certain extent. This jurisdiction was very correctly maintained by Mr. Justice *Story* in the case of *Harvey vs. Richards*, and the nature of it and its limitations were there ably stated. In that case the personal effects of a deceased person, whose domicil was in *Calcutta*, were claimed by the plaintiff, as entitled to them under the *English* statute of distribution, and it was determined, that as there were neither creditors nor distributees abroad, it would be a vain ceremony to send this property to India, and that the plaintiff ought not to be subjected to the inconvenience of seeking that justice in a distant country, which a Court of Chancery was competent to render here.

248. That the presence of the personal property may confer jurisdiction, is the principle upon which

all attachment laws are founded. The power to enact such laws is not disputed. They are indeed exorbitant, as they require a defendant to answer in another *forum* than his own; and being against the general rule of law, are not entitled to any special favour. Nevertheless laws of this description are in general use in this country, and by their means jurisdiction is given to the courts in suits against absent defendants. In some places, as in *Maryland*, attachments are used merely to compel an appearance, and may be dissolved by putting in special bail. In *Louisiana*, the attachment cannot be dissolved in this manner, and the attaching creditor acquires a special lien, which is only destroyed by a cession of property for the general benefit of creditors. In *New-York*, the attachment is for the benefit of the mass.

249. By the laws of some places the effect of an attachment is to create a lien upon the property, which will entitle the creditor to a privilege and preference over the other creditors, notwithstanding a subsequent cession of property. Where an attachment has been laid in a place governed by such a law, the privilege will not be lost by a subsequent cession made by the debtor in the place of his residence, although by the laws of that place the privilege is not granted. *Casaregis* (e) reports such a case, which was decided in *Flo-*

(e) *Il Cambista instruito*, cap. 7.

rence in the year 1719. *Lagori*, a merchant in *Lucca* being indebted to *Talenti* of the same place, the latter caused the effects of the former in *Brescia* to be sequestered. A few days afterwards *Lagori* was declared bankrupt in *Lucca*. The statute of *Brescia* gave to the sequestration the effect of a privilege upon the property sequestered. Three questions arose in the case, of which the two first only relate to this question. The first was, whether *Talenti* had acquired, upon the three thousand ducats sequestered, the privilege and priority, which the statute of *Brescia* conceded to the creditor making the sequestration: the second was, whether this privilege having been acquired was preserved, notwithstanding that the money was afterwards, by virtue of an order of the court at *Lucca* brought to that city, in which was formed the general *concorso*. It was decided in favour of *Talenti*. It is said that the statute of *Brescia*, and the other *Venitian* states, expressly granted the right of sequestering the goods of strangers, with privilege to the person first sequestering over other creditors, which was considered to affect with locality the moveables, as such a statute must be held to derogate from the common law. *In virtù di tali disposizioni fatte da detti statuti intorno a' beni mobili, divengono essi del luogo, e territorio di Brescia, o di Venezia; poichè repugna que essi sieno in un istesso tempo, secondo 'l jus commune, del luogo del loro proprietario.....onde quando gli statuenti dispongono so-*

pra i suddetti beni, convien dire per necessità, che essi abbiano voluto derogare al detto jus communis, e resi i suddetti mobili del loro proprio territorio.

250. It is upon the principle, that every sovereign has the power to derogate from the common law, to affect with locality the moveables of strangers within his territory, and to render them subject to his laws, in the same manner as their immoveable property there situate, that *Casaregis* argues in favour of the privilege claimed by virtue of this sequestration. He says, that it is an established rule of law, to attend to the disposition of the statute of the place where property is situate, and that statutes affect strangers by reason of their immoveable property; that although this rule regularly concerns immoveables and not moveables, which follow the person of their owner; yet that, where the statutes of any prince have derogated from the common law in this respect, they will no longer follow the person, but will be in nature of real property. *Per dilucidazione del primo punto, convien premettere, che in jure resta per cosa indubitata stabilito, doverci attendere le disposizioni di quei statuti nella di cui giurisdizione sono i beni controversi; e che gli statuti comprendano ancora i forestieri in ragione delle cose esistente nella loro giurisdizione, o territorio, intorno alle quali le loro disposizioni sono state fatte. E benchè questa conclusione proceda regolarmente ne' beni stabili, e non già ne' beni mobili, cioè, danari, mercanzie, e nomi di debitori, e simili, poichè secondo l'jus comune non si circoscri-*

vono ne i luoghi ove si trovano, ma seguitano la persona del loro padrone ; nientedimeno ella non ha luogo, quando o dalla pratica, e consuetudine de i paesi, o dalle leggi o statuti de' loro principi venisse derogato all'jus comune espressamente, o tacitamente, con disporre intorno ad essi a quell'effetto da loro voluto ; ed allora certamente i mobili non seguitano più la persona del loro padrone, ma diventano a guisa degli stabili del luogo, e territorio, ove attualmente si trovano, per la ragione che i principi intorno a' beni, che hanno sotto la loro giurisdizione possano ogni volta che vogliono rendere i forestieri simili a i sudditi, con disporre sopra i medesimi beni. The author says, that he had known the same point decided in two cases in *Genoa*, in favour of creditors who had sequestered the goods of bankrupts in *Venice*. This is in conformity with the rule in *England*, in cases where creditors have acquired a specific lien prior to the bankruptcy.

251. It was formerly doubted by some, whether personal actions should be considered as moveables, and whether they should not be considered to have a location at the domicil of the debtor. (a) But the common opinion seems to be well settled, that, considered *actively* and with respect to the interest of the creditor and his representatives, they must be considered as attached to the person of the creditor ; and this although the payment of the debt is secured by an hypothecation.

(a) Pinellus, *de bon. matern.* par. 1, n. 24 ; Coquille, *sur la cout. de Nivernois*, ch. 2, art. 2 ; Ferriere, *sur Guy Pape*, *quæst.* 341.

upon an immoveable property. Such is the doctrine of *Dumoulin*. (b) *Nomina et jura, et quæcumque incorporalia non circumscribantur loco, et sic non opus est accedere ad certum locum. Tum si hæc jura alicubi esse censerentur, non reputarentur esse in re pro illis hypothecata, nec in debitoris persona, sed magis in persona creditoris in quo activè resident, et ejus ossibus inhærent.* So also *Casaregis*, (c) after saying that moveables are attached to the person of the owner, and at his death will be distributed according to the laws of his domicil, proceeds to consider what will be the rule with respect to actions, and determines that they follow the person of the creditor. *An ita dicendum de nominibus debitorum, actionibus, ac juribus, quæ bona neque dicuntur mobilia, neque immobilia, sed tertiam speciem bonorum component et dicuntur incorporalia? Et respondeo affirmativè, nam statutum benè comprehendit nomina debitorum, licèt forensium, quia eorum obligationes non circumscribuntur locis, ideoque attenditur statutum, cui subjectus est testator: et hæc verior est sententia, nam debitorum nomina tanquam personæ cohærentia debent regulari secundum statuta loci, cui creditor est subjectus.*

(b) *In Cons. Paris. de fiefs, §. 1, glos. 4, n. 9; see also Boucher, sur la cout. de Bourg. ch. 25, and the authors there cited.*

(c) *In rubr. stat. civ. Genuæ, de success. ab intest. n. 64 and 65. See also Abraham à Wesel, ad constitutiones Ultrajectinas, art. 12, n. 4. Choppin, ad mor. Paris, lib. 1, tit. 1, n. 10. Christinæus, vol. 1, dec. 252, n. 6.*

252. A question arises concerning debts considered passively. In what order shall the payment of the debts of an insolvent testator be regulated? Shall it be in the order prescribed by the law of his domicil, or in that prescribed by the law of some other place? Chief Justice *Marshall* (d) has said, that "the assets of a deceased person are always distributed according to the dignity of the debt, as regulated by the laws of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made." The Chief Justice does not seem to have considered the question with reference to the domicil of the deceased, but to the place of contract. There can be no doubt, that the order of payment between creditors makes no part of the contracts, upon which those debts have arisen. But suppose a person to have died insolvent, having personal effects in a different place from that of his domicil, which are administered by an administrator acting under the authority of the court where the effects are found; as in the case of an *Englishman* dying insolvent and having personal property in *Louisiana*, where a curator for such property is appointed. In what order shall his debts be paid? In the opinion of the late Chief Justice *Tilghman* (e) of *Pennsylvania*, of Mr.

(d) *Harrison vs. Sterry*, 5 Cranch, 299.

(e) 6 Binney, 361.

Justice Platt (f) of New-York, and *Mr. Justice Porter (g) of Louisiana,* they would be paid according to the order of privileges established by the laws of the latter state. *Mr. Justice Story* seems, however, to entertain a different opinion, and to think that the order of payment of the debts of the deceased must be that prescribed by the law of his domicil. (h)

253. I do not find, that the judges above named have referred to any authorities in support of their opinions as to the order of payment; and it may not be uninteresting to inquire, how far those opinions are conformable to general principles, and to the opinions of jurists in other countries. I do not find, that the opinions before mentioned relate merely to debts contracted within the jurisdiction of the state, where the property is to be administered; but, on the contrary, they are general in the expression, and refer to all the debts of the deceased. And in this respect there can be no difference. We will then suppose an *Englishman* to have died in *London*, leaving personal property in *Louisiana*, and being deeply indebted, by specialty and by simple contract, and that some of his debts were of such a nature as are privileged by the laws of *Louisiana*, and some not privileged: in what order shall these

(f) 20 Johnson's Reports, 265.

(g) 2 Martin's Reports, N. S. 99.

(h) 1 Mason, 421 and 422.

debts be paid? Shall the bond debts be paid in full before the simple contract debts, or shall the fund contribute rateably to the payment of all; or shall those debts, to which the laws of *Louisiana* allow a privilege, be first paid? According to the opinions of judges *Tilghman*, *Platt* and *Porter*, the privileged debts would be first paid, and the residue of the fund would be divided among the creditors, by specialty and by simple contract, *pro rata*. Upon this principle, the debts would be preferred, not in the order prescribed by the law of the debtor's domicile, but by that of the place in which he had placed his effects, and an *English* creditor, who had taken a bond, would be deprived of his priority, by his debtor's sending all his effects to a state where the distinction, between instruments under seal and those not under seal, was unknown. A doctrine so repugnant to principle cannot be maintained. Personal property has no locality, but is attached to the person of the owner; and although it may so far have a situation as to give jurisdiction to a foreign court and enable it to make distribution; yet such court will be bound to distribute it in the mode prescribed by the laws of the domicile. If, in this respect, there be any distinction between creditors and those entitled to the surplus, I should be glad to know on what principle that distinction is founded.

254. The general principle is, that the debtor must be pursued in his own *forum*. *Actor sequi-*

tur forum rei. (i) Consequently the privilege ascribed to the debt will be regulated by the laws of that *forum*. And although states have derogated from this rule of law, by permitting suits to be entertained against debtors in other places than those of their domicile, by means of the property which they possess in those places, yet the nature of the debt is not thereby changed, and the privilege attached to it will be determined by the law of the debtor's domicile at the time the debt was contracted.

255. This is the opinion maintained in all the works of civilians, in which I have found the question discussed. It is on this ground that *Coquille* maintains, that actions are attached rather to the person of the debtor, than of the creditor. (k) *Mevius* (l) discusses this question concerning the order of payment, in these cases of insolvent persons and insolvent successions, and is of opinion, that it will be regulated by the law of the owner's domicile. He cites *Carpzovius* (m)

(i) l. 2. *Cod. de jurisdictione omnium judicum*. In this law the Emperors say; *Juris ordinem converti postulas, ut non actor rei forum, sed reus actoris sequatur; nam ubi domicilium reus habet, vel tempore contractus habuit, licet hoc postea transtulerit, ibi tantum eum conveniri oportet.*

(k.) *Sur les coutumes de Nivernois, chap. 2, art. 2.*

(l) *Commentarii in jus Lubicense, lib. 3, tit. 1, art. 11, n. 24—26.* The first edition of this work was published in 1664, in one volume, folio.

(m) *Benedict Carpzov.* was a distinguished jurisconsult of Saxony, who lived in the 16th and 17th centuries. His works are often cited by *Rodenburgh* and others.

to the same effect, who reports a case, of a citizen of *Hamburgh* dying at *Leipsic* and leaving merchandise there, in which it was decided, that in paying his creditors the law of *Hamburgh* should be observed. *Norma dijudicandi et ordinandi creditorum prærogativas est ex jure legibus atque moribus. Non ubique iisdem ea res dirigitur, unde factum est, ut hæc prioritatis materia tum ex diversitate privilegium tum ex discrepantiâ jurium pro intricatâ eoque difficilimâ verè habeatur. Integrò eam tractatu enucleare, et sub theatro creditorum, cujus principia lucem jam viderunt, in posterum edere constitui. Hòc locò saltem discutiam quæ ad jus Lubecense pertinet. In foro, ubi hujus viget observantia, præprimis considerabitur, quid in hòc et sequenti articulò, ubi propria hujus quæstionis sedes est, statuitur. Prævalet et hoc et derogat juri comununi. Imò etsi vel in aliò locò, quàm ubi debitor obærat civis fortè Lubecensis habitavit, exoriretur de prærogativâ disputatio, velut quòd bona alicujus à creditoribus arrestata sint, statutum domicilii attendendum est, vid. Carpzov. d. constit. 28, defin. 9, per tot. ubi refert, cum civis Hambergensis Lipsiæ decessisset, atque ibi merces quasdam reliquisset, judicatum fuisse, quod in adjudicatione vel assignatione, quæ fieret creditoribus, observandum foret jus, quod Hamburgi consuetum est.*

256. *Rodenburgh* (n) has very fully considered this question, and his conclusion is the same. He notices the distinction between the formalities of

(n) *De jure conjugum, tract. prelim. de stat. divers. tit. 2, cap. 5, n. 18.*

proceeding and the matters which relate to the decision. As in the case of a judicial sale of goods, the formalities are regulated by the laws of the place where the sale is made; but in deciding upon the privileges of creditors to be paid out of the proceeds, the determination should be according to the laws to which they are subject, being the laws of the place in which they are understood to be, which is the domicile of the owner. He cites a number of authors, (o) and a decision in *Holland* in support of his opinion. He excepts, however, the case where the debtor is still in possession of his goods. In which case he thinks, that a creditor, who by his diligence has gained an advantage allowed by the laws of the place, will be maintained in that advantage. This is in accordance with the case before cited from *Casaregis*. The passage, in which this doctrine is stated by *Rodenburgh*, is of some length, but of sufficient importance to merit transcription. *Pergamus querere ulterius, creditoribus de prælatione contenditibus quod jus cujusque loci oporteat inspicere. Primum utamur vulgatâ D. D. distinctione, quâ separantur ea quæ litis formam concernunt ac ordinationem, ab iis, quæ deci-*

(o) One of the authors cited by *Rodenburgh*, in support of his opinion, is *Andrew Gail*, who was a juriconsult of Germany in the 16th century, and one of the most celebrated of his time in that country. He was also employed in public affairs, being counsellor to the Emperors *Maximilian II.* and *Rodolph II.* and ambassador to several courts.

nionem aut materiam. Lis ordinanda, secundum morem loci, in quo ventilatur. Ut, si iudicati exequendi causâ bona debitoris distraherentur, ubi solvendo sit, executio peragatur eo loci, ubi bona sita sunt, aut in causam iudicati capiuntur. Sin cesserit foro debitor, aut propalam desierit esse solvendo, ut isti mobilium capioni, aut ulli omninò executioni non sit, ultra locus, factâ jam omnium creditorum conditione pari, disputatio de privilegiis, aut concursu creditorum veniat instituenda, ubi debitor habuerit domicilium. Unde cum apud nos relictis fortunis solum vertisset debitor obærat⁹, ac res ejus sitas in Hollandia venum proscriberet curator, creditores Hollandi, apud provinciæ suæ curiam venditioni intercidentes, causâ ibidem ventilatâ, tulerunt repulsam: audito in eo curatore, quod apud nos super universis debitoris facultatibus, adeoque et pretio ex venditione illa redigendo, ab uno eodemque iudice peragenda decidendaque sit creditorum contentio: ex communi scribentium placito, Gail. lib. 2, observ. 130, num. 13, et seq. Mæv. ad Jus Lubecens. lib. 3, tit. 1, art. 10, num. 51. Ob manifestam quoque causæ continentiam, ne super creditorum jure à diversis iudicibus dissonæ sententiæ pronuntientur. Haec de litis ordinatoriis. Aliud fere à præcedentibus obtinere dixeris in ejusdem decisoriiis. Jus enim creditorum super prioritate in bonis debitoris demetiri oportet à loco, ubi distracta bona sita sunt, vel esse intelliguntur. Et quidem de mobilibus si quærat⁹, cum semper ibi esse existimentur, ubi creditor fovet domicilium, cujus ossibus vagæ hæ res intelliguntur adhærere, utique ex lege ejusdem domicilii discutienda causa creditorum est. Judicatum

habet apud Carpov. pract. const. part. 1, const. 28, defin. 9, quod laudat Mæv. ad Jus Lubecens. lib. 3, tit. 1, art. 11, num. 26. Unde recte dixit Burgund. tract. 2, n. 21, quodcunque judex domicilii de mobilibus statuerit, ubique locorum obtinere. Hæc ita nisi forsitan executio directa in ejus debitoris mobilia, qui adhuc in possessione suorum bonorum sit, feret enim tum creditor diligentiae ac vigilantiae suæ præmium, si quod eo nomine loci mores, ubi in causam judicati ceperit mobilia, præ aliis creditoribus ipsi indulserint; quod privilegium illud non tam proficiscatur ex credito, quàm ex actu ipso executionis, quàm alios creditor prævertit, adeoque hæc res tanquam concernens exequendi ordinem, legem accipiat à loco ubi illa peragitur, ac præterea pignus illud judiciale ita constituens judex in bonis apud se in causam judicati captis, dicitur supplere vicem debitoris: ut perinde res habeatur, ac si ipse debitor bona illa eo loci pignori tradidisset, l. 2. C. si in causam judicati.

257. In the course of this dissertation I have had occasion to differ in opinion from several judges, for whom I have much respect. The principal cause of this difference will be found to be in this, that our conclusions are founded on different premises. They consider the recognition of foreign laws to rest only in judicial courtesy; whereas I believe it to be required by strict principles of law. This doctrine of courtesy appears to me to be of modern growth, and to have been unknown to those authors from whom my principles are derived. It also appears to me to be inconsistent

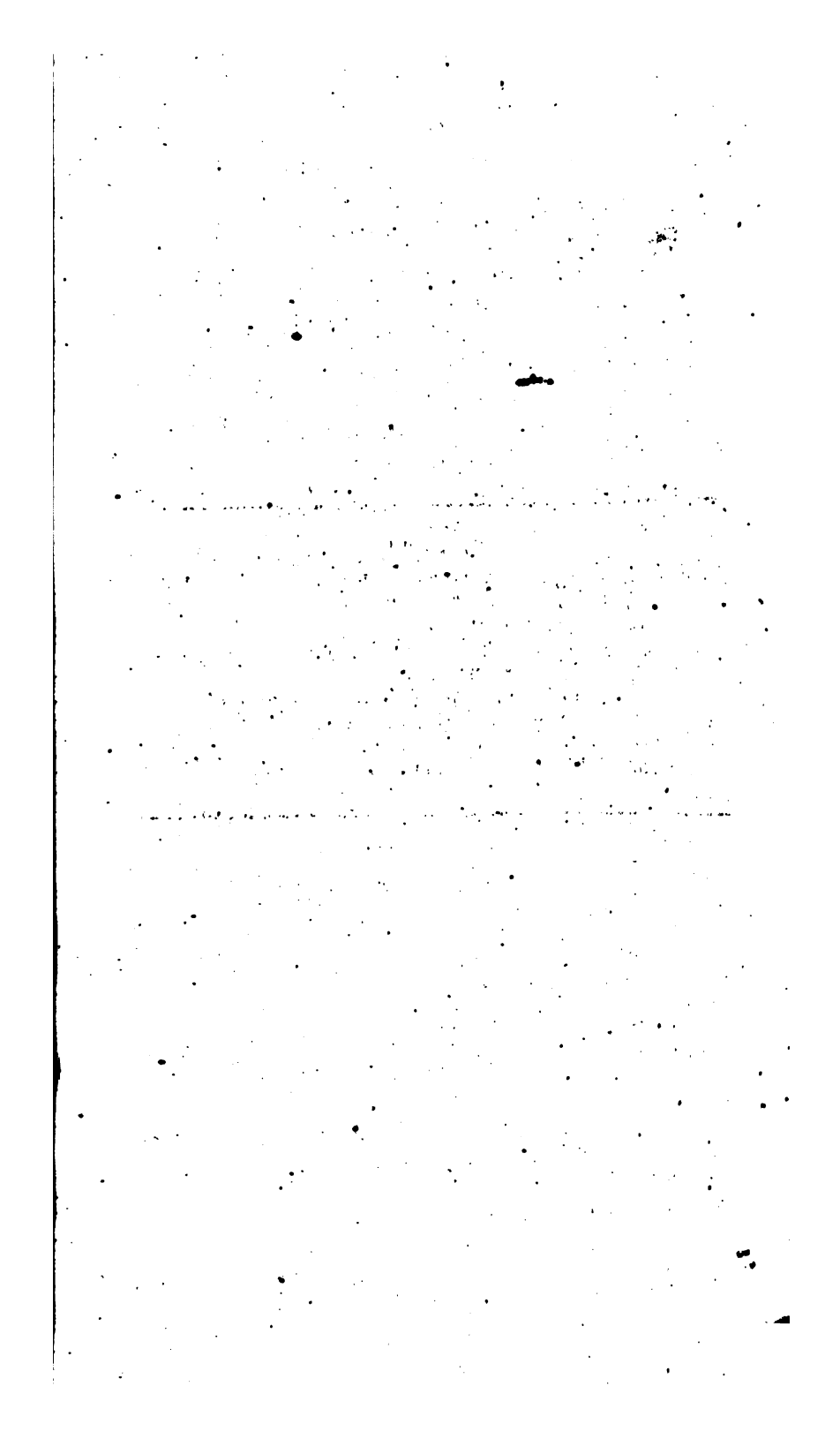
with the very nature of a court of justice. A judge of the Supreme Court of *New-York* (a) has suggested the idea of having the questions, concerning the effect of bankrupt laws, settled by treaty; and a judge of the Supreme Court of *Pennsylvania*, (b) in arguing the same question, expressed great concern to know what effect the courts in *England*, at this day, would give to an assignment under a bankrupt law of the *United States*. If I viewed these questions in the same light, I should think it not only expedient, but very necessary, that they should all be arranged, by treaty or by legislative acts, being persuaded, that neither political nor legislative power can be advantageously exercised by courts of justice.

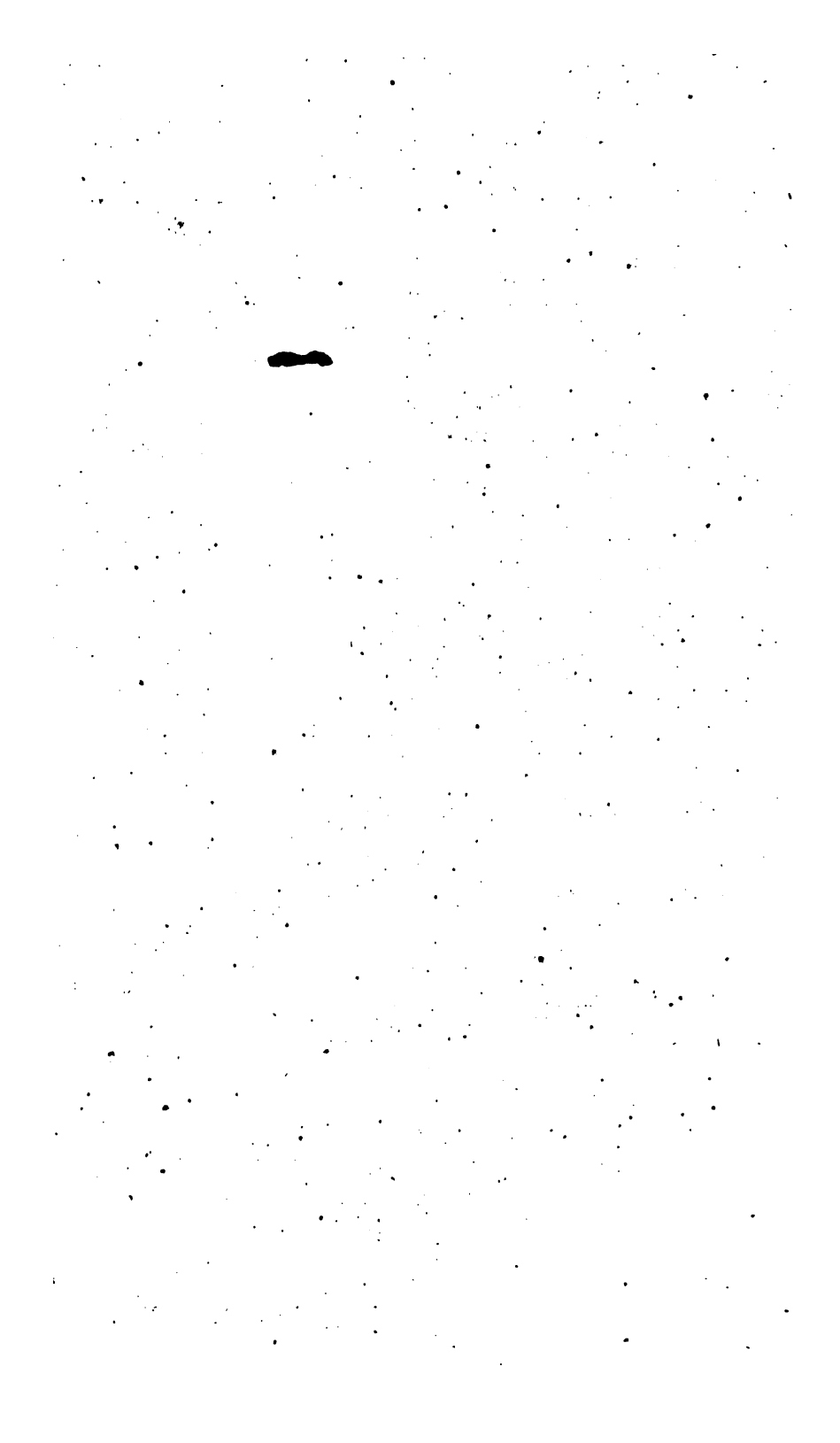
(a) Judge Platt.

(b) Judge Yeates.

ERRATA.

- Page 2, line 12, for "*contumier*" read *coutumier*.
" 8, " 23, " "*Jena*" read *Gieseen*.
" 33, " 23, *dele* "be."
" 37, " 20, for "*minor's*" read *ruinous*.
" 55, " 25, " "*valide*" read *valid*.
" 94, " 15, " "*personnelles réelles*" read *personnels réels*.
" 99, " 8, " "*statutes*" read *statute*.
" 109, " 11, " "*ten*" read *twelve*.
" 126, " 14, " "*than*" read *then*."
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